United States Court of Appeals
for the Second Circuit

APPENDIX

77-1422

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee,

-against-

DENNIS W. MULLIGAN,

Appellant.

Docket No. 77-1422

B
P/S

APPENDIX FOR APPELLANT

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Appellant
401 Broadway Suite 306
New York, N. Y. 10013

MICHAEL YOUNG, ESQ.
Of Counsel

UNITED STATES COURT OF APPEALS
FILED
NOV 30 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPENDIX FOR APPELLANT

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CRIMINAL DOCKET • U.S. DISTRICT COURT

001

PETTY OFFENSE Po	☐
MINOR OFFENSE Mo	☐
MISDEMEANOR Mis	☐
FELONY Fel	☒

JUDGE/MAGISTRATE Assigned: 0852 ~~0855~~

District: 0208 Office: 01

Disp./Sentence

U.S. vs. MULLIGAN, DENNIS W.

(LAST, FIRST, MIDDLE)

JUVENILE ☐

Case Filed Mo 10 Day 27

No. of Defts 02

Yr 76 Docket No 0988 Def 01

U.S. MAG CASE NO ▶ 76-1161

OFFENSES CHARGED

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:371	Conspiracy to commit bank robbery	1
18:2113(a) & (d)	Armed bank robbery	2

U.S. TITLE/SECTION	OFFENSES CHARGED	SUPERSEDING COUNTS
18:371	Conspiracy to commit bank robbery	1
18:2113(a) & (d)	Armed bank robbery	2
18:1623	Perjury before Grand Jury	3-7

BAIL • RELEASE

☐ Denied

AMT Set $15,000

Date 10/8/76

☐ Bail Not Made

☐ Status Changed (See Docket)

☐ Fugitive

☐ Pers. Recog.

☒ PSA

conditions

☐ 10% Deposit

☐ Surety Bond

☒ Collateral

☐ 3rd Prty Cust

☐ Other

II. KEY DATES & INTERVALS

ARREST or

*U.S. Custody Began: 10/7/76

Summons Served:

First Appearance:

High Risk Date:

INDICTMENT ☒

Information ☐

10-27-76

Indict. Waived ☐

In Charging District

Superseding ☒ Indict/Info ☐

1-26-77

ARRAIGNMENT

11-4-76

1st Plea: 11-4-76

☒ NG ☐ G ☐ NOL

☐ G. Plea W/Drawn

Final Plea:

☐ NG ☐ G ☐ NOL

TRIAL

Trial Set For: 6-6-77

Voir Dire:

Trial Began: 6-7-77

Trial Ended: 6-17-66

Disposition of Charges: 6-17-77

☒ Convicted

☐ Acquitted

☐ Dismissed.

☐ On Governm'ts Motion

SENTENCE

9-6-77

☒ On All Charges

☐ On Lesser * Offense(s)

☐ WOP.

☐ WP

MAGISTRATE

		DATE	INITIAL/NO.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant Issued			
COMPLAINT ▶		10/8/76	MDJ-08AB
OFFENSE (In Complaint)		18 USC 2113(a) and (d) and §2 - BANK ROBBERY	

INITIAL APPEARANCE DATE ▶ 10/8/76 — INITIAL/NO. MDJ-08AB

PRELIMINARY EXAMINATION OR REMOVAL HEARING ☐

Date Scheduled ▶ 10/28/76

Date Held ▶

☐ WAIVED ☒ NOT WAIVED

☒ INTERVENING INDICTMENT

Tape Number

OUTCOME:

☐ DISMISSED

☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

ATTORNEYS

Defense: ☐ CJA ☒ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

U.S. Attorney or Asst.

Thomas M. Fortuin
791-9156

Barry Iven Slotnick
233 Broadway
New York, N.Y. 233-5390

Paul A. Goldberger
401 Bway, NYC 10013
Suite 306 - 431 4150

* Show last names and suffix numbers of other defendants on same indictment/information.

02-CERASANI

PROCEEDINGS

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
10/8/76	Complaint filed, represented by Barry I. Slotnick, 233 Broadway, N.Y. Defendant released on bail, address: 17 Clinton St., Emerson, N.J., co-signer: John Mulligan, 23 Clinton St., Emerson, N.J. Deeds to both houses turned over to AUSA Thomas Fortuin.	
10/27/76	Indictment filed, 76 Cr. 988........Gagliardi, J.	
11-4-76	Deft. (atty. Barry J. Slotnick) pleads not guilty. Bail ($15,000 PRB co-signed by brother) continued. Assigned to Knapp, J. for all purposes........Cooper, J.	
11-08-76	Filed notice of appearance of atty. Barry Iven Slotnick.	
11-10-76	Pre-trial conf. held before Judge Knapp. Motions ret: 11-23-76 at 9AM.	3 11-10
11-19-76	Filed deft's notice of motion, ret: dismissal, etc.	
11-24-76	Filed Govt's notice of motion re: unsealing of records of proceedings.	
11-23-76	Deft. (atty. Barry Slotnick) Hearing held on motions. Trial set for 3-7-77 at 10AM. Knapp, J.	3 11-23-E
11-30-76	Filed memo-end. on motion docketed 11-24-76. Motion granted. Knapp, J. m/n	

DATE	IV. PROCEEDINGS (continued) PAGE TWO	V. EXCLUDABLE DELAY Interval Section II (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)
11-30-76	Filed Govt's affdvt. re: response to two motions of deft.				
01-05-77	Filed Memorandum and Order... All other grounds were disposed of on the record in open Court. The motion to suppress is in all respects denied. Knapp,J. m/n				
1-26-77	Filed Superseding Indictment & referred to Knapp,J. ....Pierce,J.				
02-25-77	Filed deft's notice of motion re: dismissal.				
03-02-77	Filed Govt's affdvt. re: response to deft.'s motoin re: dismissal of superseding indictment filed 1-26-77.				
03-02-77	Filed Govt.'s memo. of law re: trial.				
03-03-77	Filed deft's proposed examination of prospective jurors.				
03- 07-77	Govt. moves to nolle prosequi this indictment as to both				
03-07-77	Defts. granted. Knapp,J. [illegible] Larry Slotnick,Esq., present. Pleads not guilty. Bail of $15,000. P.R.B. co-signed by brother cont'd. Deft. John Anthony Cerasani, PaulA. Goldberger,Esq. present. pleads not guilty. Deft. cont'd. remanded in lieu of bail fixed by Magistrate.($15,00.). Knapp,J. Jury trial begun as to both defendants.				
03-08-77	Trial cont'd.				
03-09-77	Trial cont'd.				
03-10-77	Trial cont'd.				
03-11-77	Trial cont'd.				
03-14-77	Trial cont'd.				
03-15-77	Trial cont'd.				
03-16-77	Trial cont'd.				
03-17p77	Trial cont'd.				
03-18-77	Trial cont'd.& concluded. Thr jury is unable to reach a verdict. Defts.' motion to declare a mistrial, with the consent of the Govt., are granted. The jury is dismissed by the Court. Knapp,J.				
03-25-77	Filed deft.'s memoodanum of law re: evidence,etc.				
3-30-77	Mailed Notice of Reassignment to Judge Owen				
3-30-77	Both Dfts. - Attys. Appear for PTC. Trial Set for June 6 All Sides agree to this later date is best time......Owen J.				
4-11-77	Filed transcript of record of proceedings dated 11-4-76				
5-19-77	Filed Notice of Appearance by Paul A. Goldberger,401 Bway,NYC 10013 Suite 306 - 431 4150.				
6-14-77	Filed Govts. Request to charge.				
6-21-77	Filed Unsecured PRB pending appeal in the sum of $25,000.00.				

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

MULLIGAN, DENNIS W.

Yr.	Docket No.	Def.
76	988	01

PROCEEDINGS (continued) PAGE #3 JUDGE OWEN

V. EXCLUDABLE DELAY (a) (b) (c) (d)

DATE	PROCEEDINGS (Document No.)
6-6-77	All Sides & Court Present for trial. Dft. Conner asks for 1 Day Adj. for Personnel reasons - All Sides Agree. Court Grants 1 Day. Adj. to 6-7-77 @ 10:00 A.M........Owen J.
6-7-77	Jury empanelled & Sworn. Trial Begun & Cont'd.
6-8-77	Trial Cont'd
6-9-77	Trial Cont'd
6-10-77	Trial Cont'd
6-13-77	Trial Cont'd
6-14-77	Trial Cont'd
6-15-77	Trial Cont'd
6-16-77	Trial Cont'd Summations
6-17-77	Trial Cont'd - Summations cont'd & Concluded. Delibertions begun. & Cont. Adj. to 6-20-77.
6-20-77	Deliberations cont'd.
6-21-77	Verdict - as to Dft Cerasani = Hung Jury on Cts. 1 & 2 - As to Dft. Mulligan - Ct. 1 Hung Jury Ct. 2 Hung Jury; Ct 3 Guilty Cts. 5 Hung Jury. For Sentence July 14,1977., at 10:00 Am. For Re Trial Aug. 15,1977 @ 10:00 A.M. P.S.I. Ordered. Bail increased to 25,000.00 PRB Co-Signed by Brother..........Owen J.
7-15-77	Deft's sentence adjourned until after motion by deft's counsel for a new trial is decided. Motion is set for 8-18-77 @ 2:15 p.m.......Owen, J.
8-12-77	Filed Gov't affdvt. in opposition to deft's motion to set aside verdict.
8-12-77	Filed Gov't Memo. in opposition to deft's motion to set aside verdict.
8-19-77	Filed deft's memo of law in support of motion to set aside verdict.
8-19-77	Filed deft's reply memo. of law in support of his motion to set aside verdict.
8-19-77	Filed Transcript dated 7-13-77
8-18-77	Motion for re-trial is denied, sentence set for 9-6-77 at 2:15 p.m.......Owen, J.
8-23-77	Filed memo. and order deft's motion to set aside jury verdict is denied.......Owen, J. m/n
8-31-77	Filed transcript of record of proceedings, dated 6-28-77
8-31-77	Filed transcript of record of proceedings, dated 7-13-77
9-6-77	Filed Judgment and Commitment atty.(Paul A.Goldberger) present: The deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of Two (2) Years. on Ct. 3. Bail is continued pending appeal......Owen, J. Issued Commitment 9-7-77.
9-15-77	Filed Notice of Appeal, to the USCA 2nd Circuit.
10-18-77	*Filed Transcript of record of proceedings, dated* June 7, 1977.
10-18-77	*Filed Transcript of record of proceedings, dated* June 7,8,9 & 10-1977

Interval | Start Date | Ltr. | Tot.

AO 256A

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET **U.S.A. vs. DENNIS W. MULLIGAN S76 Cr. 988 Judge OWEN Page 4**

V. EXCLUDABLE DELAY

DATE	PROCEEDINGS (continued)	(a)	(b)	(c)	(d)
10-18-77	*Filed Transcript of record of proceedings, dated* June 13, 14, 15 & 16, 1977,				
10-18-77	*Filed Transcript of record of proceedings, dated* June 17, 1977				
10-18-77	*Filed Transcript of record of proceedings, dated* July 15, 1977				
10-18-77	*Filed Transcript of record of proceedings, dated* August 8, 1977				
10-18-77	*Filed Transcript of record of proceedings, dated* September 6, 1977				
10-19-77	*Filed Transcript of record of proceedings, dated* MAR-7, 8, 9, 10-1977				
10-19-77	*Filed Transcript of record of proceedings, dated* MAR 11-14-15-1977				
10-19-77	*Filed Transcript of record of proceedings, dated* MAR-16-17-18-1977				
10-19-77	Filed notice of certification and transmittal of original record to USCA.				
11-15-77	Nolle Prosequi granted......Owen, J.				
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

10-82

U.S. DISTRICT COURT
FILED
JAN 26 1977
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

DENNIS W. MULLIGAN, and
JOHN ANTHONY CERASANI,
a/k/a "Baba" and "Bubbie,"

Defendants.

INDICTMENT

S 77 Cr. (WK)

(S) 76 CR 988

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of October 1971, up to and including the month of February, 1973, in the Southern District of New York and elsewhere, DENNIS W. MULLIGAN and JOHN ANTHONY CERASANI, a/k/a "Baba" and "Bubbie," the defendants, unlawfully, wilfully and knowingly did combine, conspire and confederate and agree together, with each other, and with Joseph Gurnie, John Harvey, Francis J. Smith and Martin Shannon, named as co-conspirators but not as defendants herein, (hereinafter, the "co-conspirators") to commit offenses against the United States, to wit, to violate Section 2113 of Title 18 of the United States Code.

A. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully and knowingly would take and attempt to take, by force and violence and by intimidation, from the person and presence of others, money belonging to, and in the care, custody, control, management and possession of banks, the deposits of which were then and at all times referred to in this indictment insured by the Federal Deposit Insurance Corporation.

MICROFILM
JAN 26 1977

the defendants and co-conspirators, in committing and attempting to commit the offenses set forth in subparagraph A hereof, unlawfully, wilfully and knowingly would assault and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit, firearms.

C. It was further a part of said conspiracy that the defendants and co-conspirators unlawfully, wilfully and knowingly would take and carry away, with intent to steal and purloin, sums of money from the aforementioned banks.

D. It was further a part of said conspiracy that the defendants and co-conspirators unlawfully, wilfully and knowingly would receive, possess, conceal and dispose of said sums of money, knowing it to have been taken from the aforementioned banks.

OVERT ACTS

2. In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

A. On or about December 10, 1971, the defendant JOHN ANTHONY CERASANI pointed a hand gun at a teller inside The First National City Bank, 435 East 70th Street, New York, New York.

B. On or about December 10, 1971, the defendant JOHN ANTHONY CERASANI, received a bag containing approximately $45,000 in cash inside the First National City Bank, 435 East 70th Street, New York, New York.

C. On or about December 10, 1971, the defendant DENNIS W. MULLIGAN drove a car, containing the defendant JOHN ANTHONY CERASANI and co-conspirator Martin Shannon and $45,000 in cash, from the vicinity of the First National City Bank, 435 East 70th Street, New York, New York.

D. On or about December 10, 1971, the defendants DENNIS W. MULLIGAN and JOHN ANTHONY CERASANI each received approximately $11,000 in cash inside apartment number B-5, located at 34-08 30th Street, Astoria, Queens, New York.

E. On or about December 10, 1971, the defendant DENNIS W. MULLIGAN received a semi-automatic handgun from co-conspirator Martin Shannon inside apartment number B-5, located at 34-08 30th Street, Astoria, Queens, New York.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

3. On or about the 10th day of December, 1971, in the Southern District of New York, DENNIS W. MULLIGAN and JOHN ANTHONY CERASANI, a/k/a "Baba" and "Bubbie", the defendants, unlawfully, wilfully and knowingly, by force and violence and by intimidation, took from the person and presence of another, approximately $45,000 belonging to, and in the care, custody, control, management and possession of The First National City Bank, 435 E. 70th Street, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation; and in committing and attempting to commit said offense, the said defendants unlawfully, wilfully and knowingly assaulted a person and put in jeopardy the life of a person by the use of a dangerous weapon and device, to wit, a firearm.

(Title 18, United States Code, Sections 2113(a), (d) and Section 2.)

COUNTS THREE THROUGH SEVEN

The Grand Jury further charges:

4. On or about September 13, 1976, in the Southern District of New York, the defendant DENNIS W. MULLIGAN, having duly taken an oath as a witness that he would testify truthfully before a Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Southern District of New York, and inquiring for that District,

unlawfully, wilfully and knowingly and contrary to said oath did make false material declarations as hereinafter set forth.

5. At the time and place aforesaid, the said Grand Jury was conducting an investigation of possible violations of the laws of the United States regarding, among other things, armed robbery of The First National City Bank, 435 East 70th Street, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, including, among other violations, violations of the following statutes: Sections 2113 (bank robbery) and 371 (conspiracy), of Title 18, United States Code, to determine

whether DENNIS MULLIGAN and JOHN ANTHONY CERASANI, a/k/a "Baba" and "Bubbie," had participated in said bank robbery or had participated in or had any knowledge of a conspiracy, plot and plan to:

A. Take and attempt to take, by force and violence and by intimidation, from the person and presence of others, money belonging to, and in the care, custody, control, management and possession of banks, the deposits of which were then and at all times referred to in this indictment insured by the Federal Deposit Insurance Corporation.

B. Assault and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit, firearms in committing and attempting to commit the offenses set forth subparagraph A hereof;

C. Take and carry away, with intent to steal and purloin, sums of money from the aforementioned banks;

D. Receive, possess, conceal and dispose of said sums of money, knowing it to have been taken from the aforementioned banks.

6. It was material to said inquiry to determine:

A. Whether the defendant DENNIS W. MULLIGAN had associated with the defendant JOHN ANTHONY CERASANI, a/k/a "Baba" and "Bubbie," or had associated with the co-conspirators Joseph Gernie, John Harvey, Francis J. Smith or Martin Shannon;

B. Whether, for the period 1970 until the present, the defendant DENNIS W. MULLIGAN had any source of income other than his salary from the New York City Police Department;

C. Whether the defendant DENNIS W. MULLIGAN had received any proceeds from said bank robbery and conspiracy and, if so, the manner in which he had received, kept, secreted, disposed, and invested said proceeds.

7. At the time and place aforesaid the defendant DENNIS W. MULLIGAN, appearing as a witness under oath before the said Grand Jury, did testify falsely with respect to the aforesaid material matters and did make the following false material declarations:

COUNT THREE

Q. I want to show you a photo marked Grand Jury Exhibit 5. Do you recognize that man?

A. [Perusing] Not from this photo, sir, no. His face is -- it's a common face, but I'm not sure.

Q. Does the name John Cerisani mean anything to you?

A. No, sir.

Q. How about Baba?

A. No, sir.

COUNT FOUR

Q. I show you Grand Jury Exhibit 4. Have you ever seen that man?

A. No, sir, never.

O-T

Q. You have never seen him?

A. No, not at all.

COUNT FIVE

Q. I show you Grand Jury Exhibit 1. Have you ever seen that man?

A. No, sir.

Q. You're certain of that?

A. Positively.

Q. Does the name Frank Smith mean anything to you?

A. No, sir.

Q. You are certain of that?

A. Positive.

Q. Does the name Martin Shannon mean anything to you?

A. No, sir.

Q. You are certain of that?

A. Positive.

* * *

COUNT SIX

Q. How about over the past -- since 1970 have you had any sort of income other than from your job as a Policeman?

OUT

A. To the best of my knowledge, no, sir.

* * *

COUNT SEVEN

Q. And when you received money, then, you keep it in cash; is that correct?

A. No, I have no cash on hand, sir.

Q. Do you have a checking -- you don't have a checking account?

Out

A. I don't have a checking account, no, sir.

Q. When you receive cash, what do you ordinarily do with it?

A. Well, my family lives on my paycheck.

* * *

Q. I just want to ask you a moment about assets other than houses.

A. I haven't got nothing.

Q. Do you have any assets?

A. No, sir.

Q. No stocks, no bonds?

A. No, sir, nothing.

Q. How about a car?

A. I have a car, yes.

Q. What kind of a car?

A. A 1975 Oldsmobile.

Q. Other than that, do you have any assets worth more than a thousand dollars?

A. No. My wife has a station wagon that her mother bought for her.

Q. You don't have any cash other than the amount of your most recent paycheck?

A. No.

Q. You don't have any land?

A. No. The home that my family lives in, and we have a summer cottage up in Lake Apagon which we bought about four years ago, myself, my brother John and Billy, and it's run down, and we paid about $2,000 apiece for it.

Q. And you own no property other than the property you told us about?

A. None other than you can see.

(Title 18, United States Code, Section 1623.)

Kenneth H. [illegible]
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [illegible] Deputy Clerk

(Jury present.)

THE CLERK: The court is about to charge the jury. Anyone wishing to leave may do so now. Everyone wishing to remain must remain until the completion of the court's charge.

Marshal, close the door, please.

The courtroom door is locked.

THE COURT: Now, Madam Forelady, ladies and gentlemen of the jury:

We are at the point in this trial where you are soon to undertake your final function as jurors. It is here, as I am sure I said to you at the outset of this case, that you are to perform what I regard as one of the highest duties of citizenship in this country, that is, to act as ministers of justice and to determine, in accordance with the instructions that I will give you and in accordance with the evidence that you have heard, what are the facts in this case, what happened.

You are to do this and you are to discharge your duties with complete fairness, complete impartiality and, as I said when you were selected, you are to do it without any bias or prejudice for or against the government or for or against either of the defendants, Mr. Mulligan or Mr. Cerasani, as parties to this case.

This is an important case obviously to all parties, government and defendants, as well as to the public at large.

The fact that the government is a party here entitles it to no greater consideration than that given any other party or any other case. By the same token, it is entitled to no less consideration. All parties, whether it is the government, an individual, a corporation or whatever, all stand as equals before the bar of justice.

In passing on the fact issues here, which is your role, you are the sole and exclusive judges of those facts. That is not my province it is your province. You determine the weight of the evidence, you appraise the credibility or believability of the witnesses you have heard, you draw such reasonable inferences as you think are warranted from that evidence, you resolve such conflicts as you may find exist in the evidence. In doing this, I will later give you some thoughts as to how you can be assisted in determining these issues and in determining any questions of credibility or believability which you may find.

You are to decide this case, as I said earlier in the trial, on the evidence you have heard, on the reasonable inferences flowing from that evidence or from the lack of evidence, as the case may be, and not on speculation, conjecture or possibilities not supported by the evidence, nor are you to decide the case before you on the sheer oratory of any lawyer either for the government or for a defendant.

As I think one counsel for a defendant stated to you in summation, if an argument that has been advanced to you by a party in closing commends itself to you and is supported by the evidence, you may accept it, if you choose. If an argument is, however, not supported by the record on this trial before you, then, of course, you should reject it.

Now, my final function as the judge is to instruct you on the law, and I charge you that it is your duty to accept these instructions of mine and to apply them to the facts as you may find them.

With respect to any fact matter, it is your recollection and yours alone that governs as to what the testimony was. I think I told you some time earlier in this case that anything an attorney has said with respect to any testimony, whether during the trial, in a question, in an argument, in summation or anywhere else, is not to be substituted for your own recollection of what the evidence was. So, too, anything that I may have said or may have referred to during the trial or in this charge with regard to any matter in evidence is not to be taken in place of your own recollection. If you have any genuine concern as to your recollection with regard to any testimony, then you may have such testimony reread to you if you feel that is necessary. If you wish to consider any exhibit, you have only to ask for it and it will be made available to you.

I want to say as a preliminary matter that in hearing and applying my charge to this case you are to treat my charge as an entirety. It goes on perhaps for the better part of an hour and you are to consider it and apply it as a whole and not to concentrate on any particular part of it in the course of your deliberations.

(Continued on next page.)

Tk 6B
AM

gwb-1

Now let me turn to a few preliminary things.

The indictment in this case contains four counts and two defendants are on trial before you. You are to pay attention only to the evidence concerning these two defendants. In the determination of guilt or innocence, you must bear in mind that it is a personal thing. The guilt or innocence of any defendant on trial before you must be determined separately with respect to him, solely on the evidence presented against him or the lack of evidence, as the case may be, and not on any evidence that is introduced against anybody else.

This indictment, as I said to you at the outset, is only a number of pieces of paper. It is merely a charge. It is not evidence of anything, it is not proof of a defendant's guilt and no weight whatsoever is to be given to the fact that an indictment has been returned here.

Each defendant has pleaded not guilty to the charges that are typed on these pieces of paper and, thus, the Government at all times throughout the course of this trial has had and still has and will have to the end the burden of proving the charges against each defendant beyond a reasonable doubt.

A defendant does not have to prove his innocence. A defendant does not have to prove anything. On the gwb-2

contrary, a defendant is presumed to be innocent of the charges contained in this indictment.

This presumption of innocence, as you heard me say, I am sure, earlier, was in his favor at the start of the trial,it continues in his favor throughout the trial, it is in his favor even as I am now instructing you and it remains in his favor during the course of your deliberations in the jury room. The presumption of innocence, ladies and gentlemen, is removed only if and only when you are satisfied that the Government has sustained its burden of proving the guilt of a defendant be yond a reasonable doubt. At that point the presumption of innocence would fall away.

The question that then comes up is: What is a reasonable doubt? The words, I am sure you can see, practically define themselves. It is a doubt founded upon reason and arising out of the evidence in the case or the lack of evidence, as the case may be. It is a doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is a doubt which appeals to your reason, your judgment, your common sense and your experience. A reasonable doubt is not caprice, whim, speculation, guesswork, conjecture or suspicion. Reasonable doubt is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of the defendant, that you do not have an abiding conviction of his guilt, then, in sum, if you have such doubt as would cause you as a prudent person to hesitate before acting in matters of importance to yourself, then you have a reasonable doubt. In that circumstance, it is your duty to acquit.

If, on the other hand, after such impartial and fair consideration of all the evidence, you can candidly and honestly say that you do have an abiding conviction of the defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt and under such circumstances it is your duty to convict.

One final word on the subject. Reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty , would ever be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature cannot be proved by mathematical certainty. Therefore, the law in a criminal case is that it is sufficient that the guilt of the defendant be established beyond a reasonable doubt, not beyond all possible doubt.

Now let us turn to the specific charges against the defendants, and you will be given a copy of the indictment when you go into the jury room to deliberate.

The first count charges a conspiracy. It charges that the defendants Mulligan and Cerasani, together with each other and with Joseph Gernie, Martin Shannon, Frank Smith and John Harvey, conspired to violate Federal law dealing with bank robbery.

The second count charges both the defendants with the actual robbing of the First National City Bank branch on December 10, 1971.

The third count and the fourth count charge defendant Mulligan and him alone with committing perjury before the grand jury which was investigating the conspiracy and bank robbery charged in the first two counts.

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The second, third and fourth counts are called substantive counts. The first is called a conspiracy count. A conspiracy to commit a crime is an entirely separate and distinct offense from the substantive crime or of the actual crime which is the object of the conspiracy.

A conspiracy is sometimes referred to as a partnership in crime because it involves collective or organized action, presents a greater potential threat to the public interest than the illicitor activity of a single individual. It is for these and other reasons that Congress made conspiracy an entirely separate, distinct violation from the law or laws which might be the object of the conspiracy.

The essence of criminal conspiracy is an agreement or undersanding to violate another law or laws. Thus, if a conspiracy should exist, even if it failed of its purpose, it is still punishable as a crime.

Consequently, in a conspiracy charge there is no need for the Government to prove an actual violation of Federal law. Although here obviously in this case the Government contends that it has proved an actual violation as well, tha tis, that the Government contends that it has not only proved the defendants' agreement and understanding to rob the bank, but also it contends it has proved the actual bank robbery itself.

As to Count 1, which I say is the conspiracy count, it charges both defendants with conspiring to rob a bank, the United States Code provides as follows:

"If two or more persons conspire to commit any offense against the United States and one or more of such persons does an act to effect the object of the conspiracy, each is guilty of a crime".

Now, this indictment in Count 1 charges as follows:

"1. From on or about the 1st day of October 1971, up to and including the month of February 1973, in the Southern District of New York and elsewhere, Dennis W. Mulligan and John Anthony Cerasani, a/k/a Baba and Bubbie, the defendants, unlawfully, wilfully and knowingly did combine, conspire and confederate and agree together, witheach other, and with Joseph Gernie, John Harvey, Francis J. Smith and Martin Shannon, named as co-conspirators but not as defendants herein, (hereinafter, the 'co-conspirator') to commit offense against the United States, to wit, to violate Section 2113 of Title 18 of the United States Code.

"A. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully and knowingly would take and attempt to take, by force and violence and by intimidation, from the person and presence of others, money belonging to, andin the care, custody, control, management and possession of banks, the deposits of which were then and at all times referred to in this indictment insured by the Federal Deposit Insurance Corporation.

"B. It was further a part of said conspiracy that the defendants and co-conspirators, in committing and attempting to commit the offenses set forth in subparagraph A hereof, unlawfully, wilfully and knowingly would assault and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit, firearms.

"C. It was further a part of said conspiracy that the defendants and co-conspirators unlawfully, wilfully and knowingly would take and carry away, with intent to steal and purloin, sums of money from the aforementioned banks.

"D. It was further a part of said conspiracy that the defendants and co-conspirators unlawfully, wilfully and knowingly would receive, possess, conceal and dispose of said sums ofmoney, knowing it to have been taken from the aforementioned banks."

Now, in order to find a defendant guilty of conspiracy, as is charged in the first count of the indictment, you must find each of the following elements beyond a reasonable doubt.

First, you must find that there was a conspiracy as charged. You must find that at some time during the period from on or about October 1, 1971, up until February 1973, an agreement existed between at least two of those charged to violate Federal laws dealing with bank robbery.

Second, you must find that the defendant you are considering knowingly associated himself with this conspiracy or agreement and participated in it.

Third, you must find that one of the co-conspirators knowingly committed at least one of the overt acts. And I will make non-mysterious that mysterious little phrase to you in a couple of minutes.

You must find that one of the co-conspirators knowingly committed at least one of the overt acts which are set forth in the indictment at or about the time and place charged.

Fourth, that either the agreement was formed in the Southern District of New York or an overt act occurred in the Southern District of New York.

We will get this little matter out of the way.

The Southern District of New York is a Federal geographic District which includes the Island of Manhattan and the Bronx, and it runs to counties almost all the way up to Albany. But those need not concern us. This New York County, Island of Manhattan, is in the Southern District of New York.

Now, let's get into a little more detail with regard to the various elements about which I have spoken to you.

A conspiracy, as I said, is an agreement or understanding by two or more persons to accomplish a criminal or unlawful act.

To establish this, the Government is not required to show that two or more persons sat around a table and entered into a solemn pact orally or in writing, stating that they have formed a conspiracy; or to set forth the details or the means by which it is to be achieved. That is not required.

Your common sense will tell you, I am sure, when persons in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding.

What the evidence must show, ladies and gentlemen, in order to establish that a conspiracy jpb-6

existed, is that themembers in some way or manner expressly or by implication came to a common understanding to violate the law or to accomplish an unlawful plan. To determine whether there has been such a conspiracy, you may judge the facts and the conduct of the alleged co-conspirators which are done to carry out the apparent criminal purpose.

The old adage, "actions speak louder than words", is obviously applicable here. Often, the only evidence available is that of the disconnected acts or conduct on the part of the individuals charged, which acts or conduct, however, when taken by you together and considered as a whole permit the inference that the conspiracy existed as conclusively as if it had been proved by direct proof.

In short, the items of evidence are not to be taken in isolation but are to be viewed with each other.

I have previously mentioned that a conspiracy is sometimes called a partnership for conspiratorial purposes, in which each member of it become an agent for each other member. Each person in the conspiracy may perform separate and distinct acts at different times and at different places. All the conspirators need not be acquainted with each other. They may not have previously associated together. One of the defendants may know only one other member of the conspiracy.

If he enters to enter into an unlawful agreement with that other member, however, he becomes a party to the conspiracy. One conspirator may play a major role while another plays a minor role. Thus, the guilt of one is not governed by the extent, the duration or whether he played a greater or a lesser role. .

In other words, it is not required that a person be a member of a conspiracy from the very start. He may join it at some point during its progress and be held responsible for all that is done to further it after he joined and that may thereafter be done during its existence while he remains a member.

In other words, every co-conspirator is fully responsible for what another co-conspirator does or says in furtherance of the conspiracy, whether he knows about it or not, whether he specifically approves of it or not.

If you do conclude that the conspiracy as charged here did exist, you must then determine whether either Mr. Mulligan or Mr.Cerasani or both become members of it. Defendant'sparticipation in the conspiracy must be established by the independent evidence of his own acts, conduct and statements, as well as those of the other alleged co-conspirators and the reasonable inferences to be drawn from them.

To find a defendant a member of the conspiracy, you must, upon all the evidence, be satisfied beyond a reasonable doubt that the defendant was aware of its unlawful purpose, that he was a willing participant with the intent to advance its purpose and that he joined it with a specific criminal intent, that is, with a deliberate purpose to violate the law.

Knowledge on the part of a person is a matter of inference from the facts proved. Medical science has obviously not devised a way to permit us to go into a man's mind and know with certainty what he knew or thought at some time in the past. However, you do have before you testimony of certain acts upon the part of these defendants from which, if you credit it, the Government contends it has shown knowledge on the part of each defendant of the unlawful purpose of this conspiracy.

It is not necessary that the defendant be fully informed as to the details of the scope of the conspiracy in order to justify your conclusion of knowledge on his part.

I charge you in this connection you may not draw an adverse inference of participation from the mere association or friendship of a particular defendant with any other person. Mere association with the co-conspirator, even coupled with the knowledge that a conspiracy exists, is not sufficient by itself to convict. Thus, mere presence at the scene of an event allegedly connected with the conspiracy, even knowing that a crime is being committed, is not sufficient to establish that a defendant aided or abetted or participated in the crime, unless you also find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

The existence of a conspiracy may be established and one's membership in it may be established by either direct or circumstantial evidence.

Now, ladies and gentlemen, direct evidence is where a witness testifies to what he saw, heard, observed, what he knows of his own knowledge; that which came to him through the use of his own senses. That is direct evidence.

Circumstantial evidence, on the other hand, is where a fact is established from another fact. A fact from which in terms of common experience you can logically conclude that the facts sought to be established exist.

Let me give you a homely example. Let us assume that when you came into the courtroom this morning the sun was shining and it was a beautiful day out. During the course of the counsel's argument, a man came through that door with an umbrella shaking drops of water off of it. Another man came in wearing a raincoat showing obviously water on the shoulders.

Now, the fact that you observed when you came into the building that it was a clear and beautiful day is direct evidence, because you saw that,you looked at it and saw it with your own senses. The man walking into the room with the raincoat and the umbrella and the water, that is direct evidence because you saw that. But you are entitled to draw the inference from those two gentlemen coming through that door that since the time you came into this building, the sun had stopped to shine,it was no longer a beautiful day and it was in fact raining. You didn't see that it was raining, but you can logically draw that inference from the direct evidence that you observed to the fact which reasonably follows from it. It is really very simple. That is all there is to circumstantial evidence.

You may infer a fact which reasonably flows from another fact that has been directly proved before you by direct testimony.

Now, circumstantial evidence, if you believe it, is of no less value than direct evidence in your consideration of the charges here. In either case, whether the evidence is circumstantial or whther it is direct, you must be convinced be yond a reasonable doubt of the guilt of any defendant on any count and on each element of the count. If you find the Government has sustained the element of a defendant's knowing participation in the conspiracy, then we go on to the question of the next element, which is, you must find that an overt act was done to effect the object of the conspiracy and was committed by at least one of the co-conspirators after the unlawful agreement was made.

Now, what is an overt act. O-v-e-r-t is the way it is spelled and it is an ancient old legal word which really means nothing more than some step or action or conduct which is taken to achieve or further or accomplish the objectives of the conspiracy, thus showing that the conspiracy is more than mere talk.

The purpose of requiring proof of an overt act is that while parties might conspire and agree to violate the law, they may change their minds before they do anything about it and do nothing to carry it into effect. If that is so, that would not constitute an offense. The overt act which the Government must prove need not be a criminal act. Nor must the Government prove all of the overt acts which are alleged in the indictment.

In that conndction, I will get to this a little bit later. But the Government contends that defendant Dennis Mulligan drove a car on the 10th of December 1971 containing Mr.Cerasani and Mr.Shannon.

Now, the driving of the car, obviously is not a criminal act, but you can credit it, or it could be regarded by you as an overt act.

Proof of any one overt act by any member of the conspiracy is sufficient if you find beyond a reasonable doubt that it has been committed.

Let me read to you the overt acts charged in this indictment. First let me give you the preamble.

"In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

"A On or about December 10, 1971, the defendant John Anthony Cerasani pointed a hand gun at a teller inside The First National City Bank, 435 East 70th Street, New York, New York.

"B On or about December 10, 1971, the defendant John Anthon Cerasani, received a bag containing approximately $45,000 in cash inside the First National City Bank, 43ɔ East 70th Street, New York, New York.

"C. On or about December 10, 1971, the defendant Dennis W. Mulligan drove a car, containing the defendant John Anthony Cerasani and co-conspirator Martin Shannon and $45,000 in cash, from the vicinity of the First National City Bank, 435 East 70th Street, New York, New York.

"D. On or about December 10, 1971, the defendants Dennis W. Mulligan and John Anthony Cerasani each received approximately $11,000 in cash inside apartment number B-5, located at 34-08 30th Street, Astoria, Queens, New York.

"E. On or about December 10, 1971, the defendant Dennis W. Mulligan received a semi-automatic handgun from co-conspirator Martin Shannon inside apartment number B-5, located at 34-08 30th Street, Astoria, Queens, New York."

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Now, the government need not prove that the overt acts occurred at the precise times and precise places as alleged, although it contends that it has. So, too, while the indictment charges that the conspiracy began on or about October 1, 1971 and continued up until February, 1973, it is not essential that the government prove that the conspiracy started or ended on or about those specific dates.

It is sufficient, if you find that in fact the conspiracy was formed and existed for some substantial time within the period set forth in the indictment and that an overt act was committed in furtherance of the objectives at or about the time alleged.

Now, Count Two. Defendants are charged with violating Section 2113A and D of Title 18, United States Code, which provides: "Whoever by force and violence or by intimidation, takes or attempts to take from the person or presence of another any property or money or any other thing of value belonging to or in the care, custody, controal, management or possession of any bank," is guilty of a crime.

Section 2113D makes it a more serious or aggravated crime to commit a violation of Section A if in the commission of such offense a person accused "assaults any person or puts in jeopardy the life of any person by the use of any dangerous weapon or device" or aids and abets to do so. The bank for purposes of any of these sections is any bank which is insured by the Federal Deposit Insurance Company. I believe a bank official here gave testimony to that effect, assuming you credit it.

Thus in considering the guilt of either defendant under Count Two of the indictment, you must determine if the defendant whose guilt you are considering took money from the bank by force and violence or by intimidation or aided and abetted someone else in doing so. Count Two charges and I will read it to you:

"On or about the 10th day of December, 1971, in the Southern District of New York, Dennis W. Mulligan and John Anthony Cerasani, also known as Baba and Bubbie, the defendants, unlawfully, wilfully and knowingly, by force and violence and by intimidation, took from the person and presence of another, approximately $45,000 belonging to, and in the care, custody, control, management and possession of the First National City Bank, 435 East 70th Street, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation; and in committing and attempting to commit said offense, the said defendants unlawfully, wilfully and knowingly assaulted a person and put in jeopardy the life of a person by the use of a dangerous weapon and device, to wit, a firearm."

In order to find either defendant guilty of bank robbery as charged, you must find the following facts beyond a reasonable doubt as to each individual.

First, that on or about December 10, 1971, in the First National City Bank at this address we have spoken about many times was a bank in the Southern District of New York the deposits of which were insured by the FDIC as I said, there was some testimony to this effect which if you credit it, satisfies this element.

Second, that on or about that date the defendant whose guilt you are considering took the bank's money from a teller of the bank.

Third, that the defendant knowingly and wilfully accomplished this by force and violence or by intimidation.

Fourth, that the defendant in doing so either assaulted one or more persons or by the use of a dangerous weapon, to wit, a firearm put in jeopardy the lives of one or more persons.

Now, as to the requirement under this charge that the taking of the money must have been accomplished by force or violence or by intimidation, the government is not required to show that force and violence were actually used against anyone if it proves beyond a reasonable doubt that the taking was the result of intimidation. That is, the result of placing another person or persons in fear. Intimidation may be established by proof of circumstances that are normally and reasonably calculated to arouse fear in the ordinary run of human beings.

Here, in this case, the government contends that the use of guns by those entering the bank constituted force, violence and intimidation.

Finally, as I have indicated, aggravated bank robbery requires a finding either that there was an assault or that the lives of one or more persons were placed in jeopardy by the use of a dangerous weapon or weapons.

It is not essential to find both an assault and an endangering of lives by the use of such weapons.

In considering this, ladies and gentlemen, you will have in mind and please remember and apply the legal definition of the word assault, which is different than its everyday meaning to a lay person.

Theword is defined in law to an unlawful attempt or threat to apply force and violence, to inflict bodily injury when the attempt or threat is coupled with an apparent present ability to carry it out, such as to arouse fear in the intended threatened victim that he or she would be subject to immediate physical injury.

An assault as it is defined in law may be committed without actually touching or striking or doing bodily harm to the person in question.

For example, with reference to this case, the narrowing or pointing of a pistol or gun at another person for the purpose of putting that other person in fear is sufficient to constitute an assault if you find that occurred. I also mentioned to you just now even if you find no assault in connection with Count Two, aggravated bank robbery may be established if you find that the lives of one or more persons were put in jeopardy by use of a dangerous weapon. To justify such a finding here, you must be convinced beyond a reasonable doubt that the person who entered the bank carried one or more firearms which were drawn and loaded. It is not essential to such a finding that there be direct evidence that shows that these firearms were in fact loaded. If a person is engaged in the robbery and displays or points a gun to insure his demand and intends to produce a fear on a person or persons, the jury is permitted to infer from such facts that the gun was loaded and capable of inflicting the deadly injury threatened by the one who used the gun.

Now, as I indicated to you earlier in the listing of the elements that you must find, you must find here beyond a reasonable doubt that the defendant you are considering acted knowingly and wilfully. And that is done, knowingly, if it is done voluntarily and purposely and not because of mistake, accident or mere negligence or some other innocent reason. An act is wilful if it is done knowingly, deliberately and with a bad motive or purpose.

In determining whether a defendant has acted knowingly and wilfully, it is not necessary for the government to establish that the defendant in addition to knowing what he was doing, knew that he was breaking any particular law or particular rule.

Now, before I conclude this portion of the charge, there is one other statute that I must discuss with you. The defendants are also charged in Count Two under the aiding and abetting statute. That is appropriate for your consideration here bec ause the government does not claim that defendant Mulligan, also, entered the bank or carried a weapon.

Under the aiding and abetting statute, a person who commits the acts that the bank robbery statutes declare to be crimes, of course, commits the crime. But it is also a crime, not only to commit the illegal acts that I have just referred to, but also to cause a crime to be committed or to aid or abet or procure or induce another person to commit a crime. That is based upon the aiding and abetting statute which states as follows. It defines a principal in the offense as follows:

A. One who commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal;

B. Whoever wilfully causes an act to be done, which, if directly performed by him or another, would be an offense against the United States is punishable as a principal.

Thus, ladies and gentlemen, anyone who does not commit the offense, but who aids and abets an offender or causes an act to be done, which if directly performed by him, would be an offense against the United States, is a principal. In other words, anyone who shares in the intent with the person who committed the crime is knowingly associated in the venture and in a way by his action he knowingly and wilfully participates in bringing about the ultimate result, under this section, he is in the same position as a principal. That is, in the same position as a defendant or a co-conspirator who actually entered the bank.

Thus, to round this out, anyone who aids or abets another person in the commission of an illegal act is himself guilty of committing that illegal act.

Accordingly, you may find the defendant Mulligan guilty of either the bank robbery offenses charged in Count Two of the indictment, if you find beyond a reasonable doubt that other persons or other co-conspirators or any of them committed the offense charged in that count and the defendant Mulligan aided and abetted them to do so.

In determining this, you may ask yourselves these questions. Did Mr. Mulligan associate himself with the venture? Did he participate in it as something he wished to bring about? Did he seek by his actions to make it succeed? If he did, then he is an aider and abetter.

Of course to find defendant Mulligan guilty of aiding and abetting, you must find something more than mere knowledge on his part that a crime was being committed. As far as I said before, a spectator of a crime is not a participant.

Now, in connection with your consideration of the aiding and abetting statute, you are further instructed the act of escaping with money stolen in a bank robbery is a substantial element of that crime. Therefore, if the evidence proves beyond a reasonable doubt as the government contends, that the defendant Mulligan knowingly, intentionally, and wilfully aided Mr. Cerasani and Mr. Shannon in escaping after the robbery by driving the getaway car, then he would be guilty of the offense of bank robbery even if Mr. Mulligan did not know precisely what had occurred inside the bank.

I will take a break here for about 30 seconds so we can all relax and I'll catch my breath.

(Pause.)

THE COURT: All right.

Now, let's go to Counts Three and Four which are the perjury counts and are asserted against Mr. Mulligan alone.

In those, he is charged with violating Section 1623 of Title 18, which provides in part,"Whoever under oath in any proceeding before any grand jury of the United States knowingly makes a false material declaration" is guilty of a crime.

In order to sustain the burden of proof against Mr. Mulligan under either of the perjury counts of the indictment, the government must establish beyond a reasonable doubt the following essential elements:

1. That Mr. Mulligan took an oath to testify truthfully before a United States grand jury in the Southern District;

2. That he made false statements as to matters about which he testified under oath as are charged in the indictment;

3. That those false statements were wilfully made in that at the time he made them he knew them to be false;

4. As to the matters which it is charged he made false statements, those matters were material to the issues under inquiry by that grand jury.

Simply stated, ladies and gentlemen, perjury is the wilful giving of false testimony knowing it to be false as to a material matter before a competent tribunal under oath.

The law recognizes no excuse or justification for perjury. The witness is compelled by law to testify truthfully under oath before a competent tribunal such as the grand jury.

In this case, as theevidence shows, and there is no serious dispute, Mr. Mulligan did appear before a grand jury for the Southern District of New York and took an oath that he would testify truthfully and that such grand jury was authorized by law to administer oaths.

The government contends the evidence shows that the defendant gave the testimony which he is alleged in the indictment to have given. I charge you as a matter of law that the matters as to which Mr. Mulligan was asked as set forth in the indictment were material to the issues under inquiry before the grand jury before which the testimony was given. Therefore, you need not concern yourself with either the first or the fourth elements with which I have just outlined for you. You should direct your attention to the second and the third elements that I have outlined and they raise the following questions for you to consider with respect to Counts Three and Four of this indictment.

1. Was any part of the testimony given by defendant Mulligan as set forth in each of those counts false?

2. Did Mr. Mulligan give any part of the testimony knowing at the time that it was false?

Now, the government satisfies its burden of proving the falsity of the testimony in a particular count if you find beyond a reasonable doubt that any part of that testimony cited in that count is false. The counts in the indictment charging perjury contains answers given by the defendant Mulligan reciting more than one fact. It is not necessary that the government prove that each of these factual statements is false. But it is sufficient if the government proves beyond a reasonable doubt that at least one factual statement in each count is false.

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You must all agree, I charge you, as to which statement is false if you are to so find.

Now let me read to you those two counts, Counts Three and Four.

"On or about September 13, 1976, in the Southern District of New York, the defendant Dennis W. Mulligan, having duly taken an oath as a witness that he would testify truthfully before a grand jury of the United States of America duly empaneled and sworn in the United States District Court for the Southern District, and inquiring for that District, unlawfully, wilfully and knowingly and contrary to said oath did make false material declarations as hereinafter set forth.

"At the time and place aforesaid, the grand jury was conducting an investigation of possible violations of the laws of the United States regarding, among other things, armed robbery of the First National City Bank, 435 East 70th Street, New York, New York."

I will leave out a few words but the indictment will be before you to insert those if you have any concern about them.

The inquiry was "to determine whether Dennis Mulligan and John Cerasani had participated in said bank robbery or had participated in or had any knowledge of a conspiracy, plot or plan to" rob that bank.

"It was material to said inquiry to determine:

"Whether defendant Dennis W. Mulligan had associated with the defendant John Anthony Cerasani or had associated with the co-conspirators Joseph Gernie, John Harvey, Frank J. Smith or Martin Shannon.

"At the time and place aforesaid the defendant Dennis W. Mulligan, appearing as a witness under oath before the said grand jury, did testify falsely with respect to the aforesaid material matters and did make the following false material declarations:

"Count Three.

"Q I want to show you a photo marked Grand Jury Exhibit 5. Do you recognize that man?

"A (Perusing) Not from this photo, sir, no. His face is -- it's a common face, but I'm not sure.

"Q Does the name John Cerasani mean anything to you?

"A No, sir.

"Q How about Baba?

"A No, sir."

Count Four alleges the questions and answers to be as follows:

"Q I show you Grand Jury Exhibit 1. Have you ever seen that man?

"A No, sir.

"Q You're certain of that?

"A Positively.

"Q Does the name Frank Smith mean anything to you?

"A No, sir.

"Q You are certain of that?

"A Positive.

"Q Does the name Martin Shannon mean anything to you?

"A No, sir.

"Q You are certain of that?

"A Positive."

Now, you will recall that in stating the elements of perjury I said that before you could convict the defendant Mulligan you must, as one of the elements, find beyond a reasonable doubt that he acted knowingly and wilfully. The perjury statute provides the defendant is guilty of the crime when he knowingly makes a false material declaration.

I direct your attention to the fact that I have earlier defined the words "knowingly" and "wilfully" to you, but let me instruct you as to what the words d not mean.

They do not mean the government has to show the defendant Mulligan was breaking a particular law before he can be convicted of a crime. They do not mean that the government has to show the defendant intended to profit at the expense of the government or any other person, nor do they have anything to do with defendant's personal or private reasons for violating a statute. For if, after considering all the evidence, you come to the conclusion that the defendant Mulligan knowingly made a false material declaration when he testified before the grand jury, then you are instructed as a matter of law that whatever his personal or private reasons for violating the perjury statute may have been, they are of no consequence as far as his guilt is concerned.

I instruct you these words "knowingly" and "wilfully" mean deliberately, they mean intentionally. In other words, they mean that he made the false statement or false statements with knowledge that the statement or statements were false, that he intended to make the false statement consciously and in the free exercise of his will.

The words "knowingly" and "willfully" are opposed to the idea of an inadvertent or accidental misstatement. For example, if defendant Mulligan by innocent mistake made an erroneous or incorrect statement, then he would not be guilty of the crime of perjury. If he made an erroneous or incorrect statement due to a slip of the tongue or bad memory or through misunderstanding, he would not be guilty of knowingly and wilfully making a false statement.

In this regard, I deem it appropriate to remind you of the important functions served by the law against perjury. In the administration of justice we are all oath-bound. You have, each of you, taken an oath as jurors; I have, so has the Assistant United States Attorney and so has counsel for the defense when they are admitted to practice in the court. So has every witness who has been on the witness stand taken an oath. The administration of justice depends upon respect for the sanctity of the oath. The law as to perjury is an important law, one which is at the heart of our administration of justice.

Now, ladies and gentlemen, I am going to refer to what appears to be some of the contentions of the defendants, some of the major contentions of the defendants and the government here with the idea of suggesting to you areas upon perhaps which you may wish to focus. The fact that I make these suggestions to you is in no way to be construed by you as meaning that these are any more important than any other areas and you are, of course, absolutely free to disregard these suggestions and that without any question the contentions you consider and the evidence you consider are those you determine and the outcome of this case is solely for you to determine. I play no part in it.

The government contends here that if you believe Mr. Smith and Mr. Shannon, then the defendants were participants in the conspiracy, in the bank robbery, as is charged in the indictment.

You will recall Smith testified he had been on a prior robbery attempt in which Denny the cop was involved and, on the December 10th job, Mulligan's job, he said, was to put in a phone call to pull the police away from the scene.

Shannon, you will recall, testified that Mulligan was the driver of the getaway car and that Mulligan drove him and Cerasani to an apartment house across the Queensboro Bridge, to which Mulligan had a key, where they split up the money.

The government urges that the pressures upon them and the motives of Shannon and/or Smith on the witness stand were now only to tell the truth and that there is corroboration of their truthfulness in many other places, including various documents and records of the telephone company and the police department which came to light years later when the police were checking on their stories.

The defendants contend, on the other hand, that they are not guilty of these charges and that neither had any part whatsoever in the robbery charged or in any conspiracy and obviously, therefore, Mr. Mulligan could not have been guilty of any perjury before the grand jury.

The defendants contend that you cannot believe either Shannon or Smith, who say they did have a part in this conspiracy or in this robbery.

The defendants contend that Shannon and Smith both had motives to reach out to and did implicate two innocent and unconnected people in this crime in order to get a better deal for themselves in connection with their various crimes.

The defendants also contend that the items of corroboration the government points to are, upon analysis, no corroboration at all.

The government claims, among other items of corroboration, the following:

It urges upon you the fact that co-conspirator Gernie and Dennis Mulligan knew each other because Gernie was keeping company with Mulligan's cousin. It urges upon you testimony that Gernie and Cerasani were associated in 1972 and that Cerasani had the directions to Gernie's apartment on a piece of paper in his pocket on one occasion during that year.

The government contends that the police officers made an effort years later to find the apartment in Queens in which Shannon said the money had been split up and Shannon rejected all other apartments he was taken to look at over a period of two days until he was before the one which he tentatively selected, which turned out to have in it the apartment of Bernadette Michel where Miss Michel testified Mulligan stayed over once a week and to which he had a key.

The government contends that the phone call in 1976 made from the number listed to Mr. Cerasani to the number listed to Mulligan's wife and paid for by him as a subscriber coming one week after the FBI called Mulligan asking him questions about Gernie and the relationship with his cousin and before Cerasani was a suspect is a call that could only have been made from Cerasani to Mulligan having to do with concern about this bank robbery and the government urges it is particularly significant when viewed against Mulligan's later testimony before the grand jury that he did not know Cerasani.

The government calls attention to the fact that Smith told theagents it was Denny the cop's job, among other things, to make a call to pull off the police from the crime scene and then points to the computer printout showing a 911 call about the time of the robbery where an unidentified male gave the highest priority call for help and would not give his name, although the practice was to ask such a caller to do so.

The government also calls attention to the fact that Mr. Cerasani, who in his one hand gave his nickname as Bubbie in a writing on a certain piece of paper in the mid '60's and was so known to one of the bank robbers, denied that he had a nickname on the day of his arrest after having looked at a complaint which attributed a name of Baba or Bubbie to him. Now, the defendants sharply contest each of these items of corroboration that the government would urge upon you. Each defendant urges that they are not corroboration at all when you examine them.

The defendants urge that the manner in which Mr. Shannon was taken around to look at apartment houses in Queens and Long Island City was unfair and improperly suggestive and that the police were endeavoring to cause him to make an association at the apartment house of Bernadette Michel to wrongfully implicate Mulligan.

The defendants contend that the 911 phone call on the morning of the robbery would not have been made by a police officer who, they contend, would have known that his voice was being recorded.

The defendant Cerasani urges that he was nervous the morning of his arrest and, having been advised he had the right not to answer any questions, answered as he did, denying nicknames.

The defendant Cerasani urges that as to the telephone call from his number to the Mulligan number, that there is no showing who spoke on that call. He suggests it could even havebeen Mrs. Mulligan calling Mrs. Cerasani or Cerasani contends,because it was possible to dial the call with a handset from the basement of his apartment, that it could have been fabricated evidence by some officer investigating this case to bolster a false case against him.

You must determine, ladies and gentlemen, whether these various contentions of the parties, or any of the others that have been raised here over two days or a day and a half of summations, have any merit or are supported by the evidence.

Let me repeat again, because I have suggested areas you may wish to consider does not mean that I feel any of that evidence is any more important than any other evidence or that any one contention is any more important than any other contention whether or not I mentioned it. These are solely matters for you to determine in the course of your deliberations and that entire duty is yours and I play no part in it whatsoever.

Now I am getting close to the end.

Ladies and gentlemen, I have not reviewed and I will not review for you the testimony of the various people who testified before you, because while it's been before us for several days, the overall factual picture as I see it is not very extensive and counsel have done an excellent job in bringing it before you in their summations. I do want to say again that all evidence, whether or not they refer to it or whether or not I refer to it, is important and should be considered by you as well as all of the contentions offered to you by all of the parties.

I want to say also that just because evidence is uncontradicted in the record you need not accept it if you do not find it to be believable. You alone, as I have said several times now, are called upon to decide the fact issues. How do you do this?

(Continued on next page.)

Your determination, ladies and gentlemen, on the issues of credibility, to the extent you find them, depend upon impressions very largely that a witness or witnesses made upon you. Was that witness telling the truth? Was he or she giving you an accurate version of what happened? As I said to you when you walked in the door of this courtroom, when you sit in that jury box while the trial is going on and while you are deliberating, you keep your common sense and your good judgment with you. You decide whether a witness has told a truthful and straightforward story, whether a witness has attempted to conceal anything, whether he or she had a motive to testify falsely, whether there is any reason a witness might color his or her testimony.

The ultimate question for you to decide in passing upon credibility and believability is, did the witness that you are considering tell you the truth as to essential matters? It is for you to say whether a witness is truthful in whole or in part in light of his or her demeanor and all the evidence in the case.

In evaluating testimony you may consider the interest or lack of interest of any witness in a case, the bias or prejudice of a witness if you find he or she had one, the appearance, the manner in which the witness gave testimony and the opportunity the witness had to observe or note the facts concerning which he or she testified, the probability or improbability of a witness' testimony when viewed in the light of all the evidence in the case, these are all items to be taken into your consideration in determining the weight, if any, that you will assign to that witness' testimony.

The testimony of a witness may fail to conform to the facts as they occurred because he or she is intentionally telling a falsehood, or because he or she did not accurately see or hear that about which he or she testified, or because his or her reaction of the event is faulty or even because he or she has not expressed himself or herself clearly in giving the testimony. You are entitled to consider the possibility that where a witness is called on to testify long after an event and at great length, inconsistent statements may be the result of an innocent mistake or a lapse of memory rather than a deliberate intention to falsify or shave the facts.

In short, it is not unusual in lengthy proceedings to utter some inconsistancy along the line. If your consideration of the evidence makes it appear there are differing versions of the facts resulting in a discrepancy in the evidence, you will have to consider whether the apparent discrepancy involves understanable error which can be reconciled by fitting the two stories together in a rational relationship. However, if you believe this is not appropriate or possible, you will then have to determine which of the conflicting versions you will accept. You may, if you wish, accept so much of the testimony of a witness as you deem true and disregard that which you feel is faulty or mistaken or unclear.

You are at liberty, if you deem it proper under all the circumstances, to disbelieve testimony in whole or in part even though it is not otherwise impeached or contradicted. If you find that any witness has testified falsely as to a material fact before you, the law permits you to disregard completely the entire testimony of that witness on the principle that one who testifies falsely about one material fact is quite likely to testify falsely about everything. However, you are not required to consider such a witness as totally unworthy of belief. You may, if you wish, accept so much of his or her testimony as you believe true and reliable and disregard that which you feel is false or unworthy of acceptance.

In connection with the question of credibility, and particularly the testimony of Mr. Smith and Mr. Shannon, I wish to call to your attention one of the rules relating to the testimony of an alleged accomplice. Messrs. Smith and Shannon assert that they were participants in the conspiracy and the robbery charged in the indictment. You must realize, I am sure, that in the prosecution of a case the Government may be called upon to use witnesses who are accomplices. Often it has no choice. There is no requirement in the Federal courts that the testimony of one or more self-proclaimed accomplices be corroborated. A conviction may rest upon the uncorroborated testimony of one or more such persons if you find it credible and believable. Parenthetically I should note that the Government here claims corroboration as to portions of Smith's testimony and Shannon's testimony by independent proof from other witnesses and also from documentary evidence.

Smith and Shannon's, asserting that they are accomplices, however, may be considered by you as bearing upon their credibility. However, it does not follow that just because a person asserts participation in a crime that he is not capable of giving a truthful version of what occurred. Such testimony, however, should be viewed with great caution and scrutnized carefully: Did Smith or Shannon give false testimony or color testimony contrary to fact, hopeful that that testimony would result in favorable treatment on sentencing or otherwise? Or did these witnesses make a clean breast of their wrongdoing and tell the truth as to significant matters?

These are questions you must decide.

You may not draw any inferences, favorable or unfavorable, toward the Government or the defendants on trial because of the fact certain persons were not named as defendants or are not on trial before you now. Such matters, I charge you, are not of your concern and have no bearing on your function as jurors in this case.

If you find that the defendant gave a false statement in an attempt to exculpate or exonerate himself, you may consider that false statement as circumstantial evidence from which consciousness of guilt or criminal intent may be inferred, for it is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate an explanation or statements tending to establish his innocence.

Whether or not evidence as to any defendant's statement points to consciousness of guilt and the significance, if any, to be attached to any such evidence are matters solely for your determination.

You have heard the testimony as to these statements. If you find that a defendant whose guilt or innocence you are considering did make the statement, then you may give that statement such weight as you believe it deserves under all the circumstances brought out in the evid

Obviously, as I have instructed you earlier, you are to consider any such statement only as against the defendant that made it and against no other defendant.

The Government here contends and charges in Counts 3 and 4 that defendant Mulligan lied when questioned before the grand jury when he denied recognizing photographs of or knowing John Cerasani or Frank Smith or Martin Shannon. It is up to you to decide if Mr. Mulligan actually lied. If you find he did, you may take that into account in determining his guilt on the first two counts in accordance with the instructions I have given you a minute or so ago.

So, too, the Government contends the defendant Cerasani lied when he said he had no nickname when being questioned by the FBI after he was presented to the United States Magistrate. It is up to you to decide whether he actually lied. If you find that he did, you may take that into account in determining his guilt on the first two counts.

Whether or not evidence as to a defendant's statement points to a consciousness of guilt and the significance, if any, to be attached to any such evidence,are matters solely for determination by you.

Perhaps this would be a good place to mention the question of assessing the testimony of Government employees. The fact that certain witness were Government employees or agents of the FBI or members of the New York City police department does not entitle their testimony to any greater weight or consideration than that accorded any other witness in the case, nor does it entitle any such witness to any less consideration than that given by you to any other witness. You are to evaluate the testimony of such a witness the way you would do that of any other witness.

Now,neither defendant has testified in this case on his own behalf.

Under our Constitution, neither had any obligation to testify or to present any other evidence because, as I have said, the burden is on the Government to prove a defendant guilty beyond a reasonable doubt as to all of the elements in the case and that burden remains upon the Government throughout the entire trial and does not shift.

Further, a defendant has a right to rely upon the failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of Government witnesses.

The law does not impose upon the defendant the duty of producing any witnesses whatsoever. You may not consider in any way whatsoever in your deliberations or attach any significance to the fact that neither Mr. Mulligan nor Mr.Cerasani availed himself of his constitutional right not to testify. No adverse inference may be drawn against either defendant by you because of the exercise of this privilege. In short, the fact that a defendant did not testify may not be considered by you at all.

The defendant Mulligan introduced witnesses who testified to his good reputation in various communities for honesty, integrity and truthfulness. Assuming you credit this testimony, you may properly consider whether a person with this character would perpetrate the crimes charged in this indictment.

Therefore, you should consider this evidence in the case in determining whether the prosecution has proved him guilty beyond a reasonable doubt.

Evidence of good reputation may in and of itself create a reasonable doubt as to guilt where without such evidence no reasonable doubt would exist.

On the other hand, if, upon all the evidence in the case, you are satisfied beyond a reasonable dout that Mr. Mulligan is guilty, a showing that he has previously enjoyed a good reputation does not justify or excuse the offense. You should not acquit him merely because you believe he is a person of good repute.

Also, I want to charge you the testimony of a characte witness is a reflection of reputation in the community. The testimony of character reputation is not to be taken by you as a witness' opinion as to the guilt or innocence of the defendant on any charge in this indictment. The guilt or innocence of defendant Mulligan is for you and you alone to consider.

Now, you must consider, and I want to say this generally, you must consider each defendant separately as if he alone were on trial. You must consider each count separately and you must return a separate verdict as to each defendant one each count.

If you fail, ladies and gentlemen, to find beyond a reasonable doubt that the law has been violated as to any defendant on any count, you should not hesitate for any reason to return a verdict of acquittal, but if, on the other hand, you should find that the law has been violated as charged, you should not hesitate because of sympathy or other reason to return a verdict of guilty as a clear warning that a crime of this character may not be committed with impunity. The public is entitled to be assured of this.

The Government, to prevail, must, as I have said, prove each essential element of each charge by the required\degree of proof. If the Government has succeeded, your verdict should be guilty.

If the Government has failed, your verdict must be not guilty.

Your verdict must be unanimous. Under your oath as jurors you cannot and are not to allow any consideration of a sentence which might be imposed upon a defendant if convicted to enter into your deliberations or influence your verdict in any way. Your duty is to decide the facts here, to decide the case solely and only upon the evidence before you.

In the event of a conviction, the duty of imposing sentence rests solely with the Court.

Each of youis entitled to his or her own opinion, but you should exchange views with your fellow jurors. That is what jury deliberation means, to discuss and consider the evidence, to listen to the arguments of fellow jurors, to present your individual views, to consult with one another and reach an agreement based solely and wholly on the evidence, if you can do so without violation of your individual judgments.

(continued on next page.)

End 8B AM

9A AM

Each must decide the case for himself or herself after a consideration and discussion with his or her fellow jurors. But you should not hesitate to change an opinion which, after discussion with your fellow jurors, appears erroneous.

However, equally, if after careful consideration of all the evidence and arguments of your fellow jurors, you entertain a conscientious view that differs from others, you are not to yield your conviction simply because you are outnumbered or outweighed. Your final vote must reflect your conviction as to how the issues should be decided.

If the Government has failed to carry its burden, you should acquit. That is your duty. If the Government has carried its burden, you must not flinch from your sworn duty but must convict.

During the course of your deliberations one or more of your members may request a questionof the Court or desire to have testimony read or desire to have an exhibit in the jury room. If you desire that after your discussion, you may communicate with the Court and request those things. There are other reasons why you may want to communicate with me. Such as when you have reached a verdict. In doing so, I want to caution you that you are not to indicate in any communication to me how your vote is, if any stands at that time. Your deliberations are secret and it would be a breach of that secrecy to indicate how you are voting at any time except to, as I say, ask for an exhibit or for testimony, if that is appropriate or to announce that you have reached a verdict, a unanimous verdict.

Ladies and gentlemen, that concludes my charge on the law.

Gentlemen, do you have any matters you wish to bring to my attention?

MR. GOLDBERGER: Yes, Judge.

THE COURT: Will you stay in place, I am going to the robing room with the lawyers.

(In the robing room.)

THE COURT: Yes, Mr.Goldberger?

MR. GOLDBERGER: Your Honor, in regard to your charge on circumstantial evidence, I am not sure if it was -- well, let me just state, in regard to your charge on circumstantial evidence, "you may draw inferences proved by the direct testimony." That was the language that I heard. I think they can draw inferences not only from the direct testimony, but from the cross-examination or any other evidence in the case.

THE COURT: Well, I said that.

MR. BLOCK: Direct testimony or direct evidence?

MR. GOLDBERGER: I think you were referring to the words "comparison of direct evidence" but I think you said "direct testimony".

THE COURT: If there is any ambiguity -- but in context I don't think it could possibly be.

MR. GOLDBERGER: I object again to your Honor indicating that the act of escaping was a substantial element. I objected to that when we discussed the charge before.

THE COURT: Yes.

MR. GOLDBERGER: I reiterate the objections we took with regard to your charging in the perjury count as any part is perjury. I think as a whole the claim must be perjurious. I object totally to your Honor's marshalling the contentions of both sides, rather than to go through each and every one, I think that the Government got far the better of the deal in your Honor's marshalling of the contentions. I think more, the Government's evidence was marshalled and they were marshalled with more particularlity and specificity with regard to the subjects indicated.

THE COURT: Your exception is noted.

MR. GOLDBERGER: I also object to your Honor's charge on accomplice testimony. I think your Honor weighted that charge in favor of the Government towards the believability of an accomplice as opposed to caution and care and the truth that should be paid attention to the accomplice's testimony.

I don't think that was the purpose of the accomplice rule.

THE COURT: Exception noted.

MR. GOLDBERGER: I also except to your Honor's last comment which I objected to the other day. Clear warning as to showing the crimes will not be committed with immunity.

Your Honor also made, I believe, a slip of the tongue when you actually stated that Mrs. Mulligan coul have called Mrs.Cerasani.

THE COURT: That is what counsel said.

MR. GOLDBERGER: No, the call came from the Cerasani apartment to Mulligan.

MR. BREITBART: That was never argued.

THE COURT: I took note of it and you said it that way.

MR. GOLDBERGER: It is on the record and I want my objection noted to that.

THE COURT: Am I correct in that, Mr.Block?

MR. BLOCK: I have a different understanding and I want to raise it at this time. I thought what Mr. Breitbart was saying, if you found that Mrs. Cerasani was calling Mrs. Mulligan, but that still is in favor of the Government's contention.

THE COURT: I heard him saying it as Mrs. Mulligan calling Mr.Cerasani. I said exactly as Mr.Block said. Would you correct that, it is not Mr. Breitbart's contention that Mrs. Mulligan was calling Mrs.Cerasani, but it was Mrs.Cerasani calling Mrs. Mulligan?

I think if you look at the minutes you will find I said the other way around.

MR. GOLDBERGER: With regard to a comment you made in regard to the Cerasani nickname. You said that Cerasani said he had no nickname. It is "alleged", Judge, you forgot to use the word that the Government "alleges".

THE COURT: I said the Government contended. I think that is what I said. Did I not?

MR. GOLDBERGER: One other objection to your Honor's charge in terms of inconsistencies of the testimony between Shannon and Smith was extremely favorable to the Government and prejudicial to the defendant. I got the opinion from listening to it that the Court was explaining away Shannon and Smith's inconsistencies as being minor and not of too great importance.

End 9A AM

THE COURT: Your exception is noted.

MR. BLOCK: With respect to that last matter, your Honor, I understood your comments with respect to consistencies is to be directed to inconsistent statements by the same witness at different points of time in extensive cross examination.

Mr. Goldberger is referring to inconsistencies by different witnesses at this trial and I did not understand your charge to be read that way.

THE COURT: My charge was in fact directed at that. If I said something different, I would be surprised.

Mr. Breitbart?

MR. BREITBART: I wanted to inform the court that I didn't feel I had ever argued that Mrs. Cerasani called Mrs. Mulligan.

MR. GOLDBERGER: May I know what the court is going to charge with regard to that, if you are going back to correct it?

THE COURT: I am going to say that whatever may have been thought here, it was Mr. Breitbart's argument that Mrs. Cerasani might have called Mrs. Mulligan.

MR. BREITBART: It is not the case. At no time did Mr. Breitbart argue that Mrs. Mulligan called Mrs. Cerasani.

THE COURT: What do you want me to say?

MR. BREITBART: I would like you to say that I described the defendant's contentions with regard to certain issues and I would like to correct the fact that Mr. Breitbart at no time argued that Mrs. Cerasani called Mrs. Mulligan.

THE COURT: Can I add it was theother way around? Because you did say that. You did mention the call between the two women.

MR. BLOCK: Your Honor, if I can be of some assistance, if I understood Mr. Breitbart's argument, it was that if thejury finds that anybody in that apartment called the number at the other end, that's one thing. He was arguing that if therecord shows such a call, it was not made from the apartment.

Is that correct, Mr. Breitbart?

THE COURT: Should I stop where we are at? You say in describing certain of the defendants, Cerasani's contentions, I want to correct my misimpression I gave that Mr. Breitbart did not argue that Mrs. Mulligan called Mrs. Cerasani.

MR. BREITBART: Or that Mrs. Cerasani called Mrs. Mulligan.

THE COURT: You did suggest that.

MR. BREITBART: I believe that Mr. Block's recollection and my recollection are the correct ones. But if your Honor would like to get the minutes back here, I would be very --

THE COURT: The trouble is the jury is waiting.

MR. BREITBART: The sum and substance being is that I did not at any time acquiesce the communications between the parties of those addresses. You heard it that way, didn't you?

THE COURT: I will say it the way you want it.

MR. BREITBART: I appreciate that.

THE COURT: But my memory was that you wafted into the jury box the suggestion that Mrs. Mulligan called Mrs. Cerasani.

MR. BREITBART: It was a negative, your Honor.

THE COURT: I will give it the way you want and say that you did not argue to the jury or you did not say to the jury or you do not contend to the jury that Mrs. Mulligan had called Mrs. Cerasani or that Mrs. Cerasani had called Mrs. Mulligan.

MR. BREITBART: Thank you, Judge.

THE COURT: All right.

(In open court.)

THECOURT: Just two brief matters that counsel called to my attention. In discussing, ladies and gentlemen, the difference between circumstantial evidence and direct evidence, I want to create, or I want to dispel any misapprehension. What I was referring to there was not direct evidence as opposed to cross examination.

When I am saying "direct evidence", as the basis for inference, it was a fact that was competently proved before you or which the witness competently brought before you by reason of his senses. That evidence could have come into therecord either through direct or cross examination. It is by that I mean direct evidence as opposed to circumstantial evidence. It doesn't mean that direct evidence could not have come in on cross examination.

Now, further, during my recital of defendant's contentions, I may have made a statement which I will correct. That is I recited that it was contended that Mrs. Mulligan might have called Mrs. Cerasani as one of the defendant's contentions. It is not contended and defendant Cerasani did not argue to you either that Mrs. Mulligan called Mrs. Cerasani or that Mrs. Cerasani called Mrs. Mulligan. Very good.

Mr. Levinowitz, I'm afraid I must now excuse you from further service. You will have my thanks of the courtroom.

(COPY)

Monday, June 20th
8 P.M.

Your Honor,

For the last three hours I have been agonizing over the verdict of "guilty" to the first charge of perjury against defendant Dennis Mulligan in the Government versus Mulligan - Cerasani case.

As you well know we were dead locked for almost two days on all the counts in the indictment. But in one last effort to achieve cooperation and unanimity I voted "guilty" to the charge of perjury even though I was not convinced of the guilt at all. I can only speak for myself, of course, but I know that two or three others voted the same way I did on a seemingly "unimportant" charge in the hope of swaying some members of the Jury (a small minority) to vote "not guilty" on the other more "important" counts.

In other words it was an unspoken trade, a bargain; and now I am deeply and sincerely sick at heart for my action.

For my own sanity I had to tell you this and I do hope it reaches you. I am willing to come down again to speak to anyone you wish about this.

One last word: If ever I am in trouble and am brought to justice I hope and pray that the presiding judge will have your patience, fairness, sense of humor and above all your compassion.

Thank you.

Sincerely

Yusef Bulos
Juror #9

161 W. 75th St. 10B
N.Y.C. 10023
212 - 877-6035

(COPY)

5 July 1977

Mr I Block

76-2162

[illegible]

D. N. Y.

Hon. Ira Block, Esq.
Asst. U.S. Prosecuting Attorney
U.S. Attorney's Office
1 St. Andrew's Plaza
New York, N.Y. 10007

Dear Ira Block:

Thoreau said, "If a man does not keep pace with his companions perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away."

Thoreau was right. I'm so glad I listened to my different drummer and did not let the discordant sounds of others sway my step. It's been two weeks now, but the sounds of my drummer grow louder and clearer each day. And my pride grows stronger with each beat!

It is difficult to formulate what I wish to say to you, tho' I am normally more facile at the written word than the spoken. I owe you a great debt of gratitude, Ira Block. A debt to be shared in part with Ageny Walker, Mike Roche, Judge Owen, even my fellow jurors, and yes, "my character," Frank Smith. But it is you who stand out in greatness.

What happened to me as a juror was totally unexpected -- from the first gasp of surprise at being chosen, the exhileration of the trial itself, the agony of deliberation, my tremulous talk with Agent Walker immediately following the trial, to the final moments in your office. I wish I could have spoken to you more extensively at that time. But the circumstances were not unlike being in the "inner office" of a candidate, whom you've worked for and beleived in, at the moment of victory. There is little time to say much to those immediately surroun ing the candidate -- but the thrill of just being there defied description. Thank you for letting me share in your "victory." I just hope you meant it when you said you were happy with our one count of purjury.

I, of course, wish your victory had been complete. I wish we could have convicted on all counts. But Ira (I hope you don't mind my calling you Ira. I do feel rather close to you after all this), your victory was much greater than the conviction of two criminals. You restored conviction (or, faith, if you will) to a fellow human being. That is greatness. You succeeded in doing something that five years of anaylsis with a brilliant doctor could not do.

As I told you, the weekend before our final deliberations on Monday, I literally descended into hell. I dredged up five years of analysis and then some. I went through a complete catharsis of the soul. It was not pleasant. And I had to do it alone. But I came out a different person -- or more accurately, the person I once was.

I regained my self-confidence. In beleived, for the first time in

- more -

years, in myself (my talent, my ability, my system of values). I beleived with all my heart that I was right, despite the fact that eleven other people said I was wrong. And, just as I regained my own self-esteem, I regained my esteem for my fellow man. I recognized that there are lots of good people out there -- and how very fortunate I'd been throughout my life to have come in contact with so many of them.

I understood, perhaps for the first time, the meaning of "an ideal." And why men and women were willing to go to any extreme for something so intangible. I never thought I could. But I know now that I could -- and I would.

You asked me in your office if all this had restored my faith in the jury system. I answered, "I don't know. Not with that jury it hasn't." Well, I was wrong. (Please understand that at that time I'd neither eaten nor slept, except fitfully, for three days and I'd just spent over an hour re-hashing the whole thing with Agent Walker.) To answer your question more accurately, yes, it has re-affirmed my faith in the jury system. I still find it far from perfect, but I can't conceive of a better system.

For instance, four jurors wanted to change their minds about our conviction on one count of purjury right after we'd sent the note to Judge Owen. The other jurors talked them out of it. Following our conversation on Monday in your office, I spoke with two of my fellow jurors on Tuesday. I didn't tell them the things I'd said or what you and Agent Walker had said. I merely wanted to re-assure them that we'd been right in our original conviction. They told me that four of them had left together -- including two of those who'd wanted to change their vote. As they left, they were approached by a U.S. Marshall (no less!!) and were told, "You're stupid! That cop's innocen That's wrong! I can live with my conscience because I'm convinced I was right. But think of those people. They are less strong than I, and will live in doubt and false guilt for the rest of their lives. (I just wish he'd approached me. I'd have told him what I thought -- including how unfit he was for his job!)

Despite all this, my faith in the judicial system per se has been greatly restored. Due mainly to men like yourself, Judge Owen and Judge Haight (whom I was called before along with 40 other prospective jurors, but never interviewed). These are not the political pawns I once thought. Rather they are men of wisdom, fairness and concern. That awareness alone makes it all worth while.

But the most important thing (selfishly, perhaps) to come out of all this is that I've begun to write again. I can't tell you how long it' been since I've written so much as a letter! (Maybe that's why this one's so long.)

Friday, July 1, was my birthday. And for the first time in years I felt it was a real birth-day. And it was a happy one. I was the me I started out to be. I'm writing again! Eagerly. Avidly. With enthusiasm! I am deeply involved in a project I firmly beleive in (my Frank Smith book). Thank you, Ira Block -- that's a heck of a birthday present!

- more -

Remember when I spoke to you the Friday following the trial? You said you'd speak to Smith's attorney the next week, but I said, "No, there's too much preliminary work to be done first." Actually what I was saying was that I had to be sure of *me* first. That this wasn't just some transitory thing. "Post-trial exhileration syndrome", if you will.

Well, I'm sure now. I've spent countless hours in the library. And I spend at least 3 to 4 hours each night (usually more) writing -- *something!*

You were right. I'm not going to get anything out of the newspapers that I don't already know. But the discipline has been good. And I did pick up a bunch on the bank robbing business which I need to know as background material in order to write a fictional book. I'm ready now, Ira. I convinced I can *do* it!

So, you, to whom I am already so deeply indebted, I turn to and ask, "May I extend that debt a little further?"

I am ready now to talk with Mr. Smith. I realize this must be arranged through his lawyer. So can you put me in touch with the lawyer?

The book will be entirely fiction. Quite frankly, I have no up-front money, but I do have fantastic publishing contacts. And I am willing to split the royalties 50/50 with Mr. Smith. After all, it's his story, I'm merely writing it. Also, I have no lawyer of my own at this time. But when the time is right, when I have something solid to present to a publisher (2 or 3 chapters, say), I know where to get one. And I will let him thrash out the details (movie,TV,serial, Scandanavian and Latin American rights, etc.) with Mr. Smith's lawyer.

Next. If Smith is going to testify at upcoming trials, I'd like to know the dates of his scheduled testimony. I'm not particularly interested in the trails per se -- I just want the feel of my character.

Next. Since Smith gets out of jail in November, I must arrange all my interviews with him before that time. I still have 3 weeks vacation coming to me -- and I'd like to spend them talking to Frank Smith. Preferably during the daytime, although, undoubtedly more interviews will be necessary, but we'll worry about that later. If possible I'd like to schedule the interviews for late July and early August. That way we'll still have a couple of months to play around with (to fill in skimmed over points, check technical material, etc.).

Next. I know that neither you nor the FBI can open your files to me. Nor can you go with me to interview Smith. That I must do alone -- and want to do it alone. But I would appreciate any leads you can give me.

Next. I know that Grand Jury testimony is not available to the general public. But trial testimoney *is* a matter of public record! How do I gain access to transcripts of *Smith's* previous trials, or trials he has testified in? Where do I go to read them? Do I need

- more -

special credentials?

It's getting very late -- and sitting in an un-airconditioned, un-windowed office tends to make the Muse's voice a little hoarse. But Ira, we've got one hell of a book! And just think, the government's going to get its money back triple fold. First I'm going to pour my "jury money" back into the economy by buying an electric typewriter for my apartment (already have one picked out!). Next, we make enough money on the royalties and Frank Smith will never have to rob another bank. Next, we make that much money on royalties, as a single person, non-head-of-household-type tax payer the goverment's going to rob me! Which may make me want to go out and rob a bank -- which will pay the salary of some assistant US prosecutor, not to mention countless FBI agents. So, you see, one way or the other, it's all for the good of the country!

Am enclosing my card. Please give me a call at your earliest convenience. Or, if you're ever in the neighborhood drop in for a cup of coffe (altho' I don't drink that either, but I'll settle for a Coke) -- I'd still like very much to talk with you.

Hope your Fourth of July was as happy and meaningful as mine.

Again, Ira Block, I thank you -- for so very much.

Sincerely,

Ginger

Ginger Stephenson
220 E. 54th St., #5-B
New York, N.Y. 10022

MR. BREITBART: Could you ask her a couple of questions about the nature of the proceedings?

THE COURT: If we are going to go that far, if you have that concern, I would just as soon exercise --

MR. BREITBART: I was going to offer that as an alternative to Mr. Block's application. He felt she had a language problem.

THE COURT: My concern is I am not sure she is going to catch what is going on here. I think I will exercise my prerogative and excuse her.

(In open court)

THE COURT: Mrs. Riedler, I am going to excuse you.

THE CLERK: John R. Seamen, seat No.4.

BY THE COURT:

Q Mr. Seamen, you are from West 107th Street, according to this.

A (P.J.NO.4) Yes.

Q How long have you lived there?

A I have lived there off-and-on for seven years, perhaps.

Q And before that?

A On the upper West Side.

Q What do you do?

A I am a magazine editor.

Q What magazine?

A Electronic Problems.

Q How long have you been there?

A A year and a half.

Q What before that?

A Another magazine.

Q Going back 10 or 15 years you have been in this magazine field?

A Similar jobs also, but mostly magazines.

Q And are you married, sir?

A I am single.

Q And what is your educational background?

A I am a B.A. and some graduate school.

Q Have you ever served as a juror before?

A Yes, I have.

Q What kind of cases?

A Civil.

Q Would there be any risk of any spill-over from those cases or could you decide this case on the evidence you hear here and the law I will charge if you were selected?

A There should be no problem.

Q Have you ever been the victim of a crime or a witness or complainant or a defendant?

A The answer to both questions is yes. I have appeared when I was young and footloose around the country, I appeared before magistrates on two occasions and there was never any conviction. That was years ago.

As to being a victim, on the upper West Side I have been the victim of people attempting to hold me up several times, several muggings.

THE COURT: Come up.

(In the robing room)

BY THE COURT:

Q You say you were before a magistrate on two occasions?

A Yes.

Q What kind of thing?

A Hitchhiking in one case.

Q What about the other case?

A The other case I was in a disturbed -- I hadn't worked and I was in a disturbed state of mind and got into a taxicab and tried to commandeer it. In that case, I was remanded to a state mental hospital.

Q How long ago was that?

A Ten years.

Q When were you released from that hospital?

A I was in state hospitals twice. The last time I was released was in December, 1967. I have been steadily employed since then.

THE COURT: Any of you gentlemen want to inquire through me at this point?

MR. BLOCK: I would be interested in knowing where this incident with the taxicab occurred.

P.J. NO.4: Philadelphia.

MR. BREITBART: Judge, I would like you to inquire from Mr. Seamen whether since '67 or the like, whether or not he has been involved in therapy with some professional agency or out-patient setup.

P.J. NO.4: I was in group therapy for seven years, and I occasionally see a psychologist on occasion.

MR. BREITBART: I would like to ask Mr. Seamen, he said there were attempted muggings. Being a native New Yorker, I would like to find out how he avoided those things both from the point of curiosity and to find out how he handled those things.

P.J. NO.4: The first time I was terrified, at knife-point. I gave him $90. It was more or less like shakedowns. I refused to be pushed into a doorway and pushed back a little.

MR. BREITBART: You fought them off?

P.J. NO.4: Shouting and screaming.

MR. BREITBART: How many times did that happen?

P.J. NO.4: Amsterdam Avenue and 107th Street isn't the best location. I was working nights for about five years as a book store manager. I got home between 2:00 and 4:00. I would say altogether there were six, something like that.

MR. BREITBART: I have had all my questions answered.

MR. GOLDBERGER: No questions, sir.

THE COURT: Thank you very much. You can resume your seat.

MR. BLOCK: Your Honor, while we are together, may we remain for a moment?

(Mr. Seamen leaves robing room)

MR. GOLDBERGER: Off the record.

(Discussion off the record)

THE COURT: Let's go on the record.

Do you have any special thoughts about this man? So far I don't see any grounds for disqualifying him for cause.

MR. BLOCK: The only thing that occurs to me, your Honor, is at the last trial there was a rather unusual note that came back from a juror a few minutes after they went to deliberate. I was not there, but I think I share the same view as defense counsel. It resulted from someone who obviously just had -- was unable to or refused to comprehend things Judge Knapp labored quite painfully to put across to the jury, such as there was a presumption of innocence and whether or not the defendant's wife was sitting in the courtroom had nothing to do --

MR. GOLDBERGER: The first question the lady asked was how could the defendant be not guilty if his wife hasn't been present in the court. There was a series of those questions.

What Mr. Block is leading up to is we had a problem in the last case in terms of mental balance of one of the jurors.

MR. BLOCK: I think it comes down, if you are willing, I would consent to the juror being excused.

MR. GOLDBERGER: I think he probably should be just to be on the safe side. I don't want him to commandeer the jury.

THE COURT: I know, but --

MR. BREITBART: I don't think there are any grounds.

THE COURT: I don't think there are any grounds to excuse him. I will go along with these consents where it is obvious to me it is the fairest thing to do, but in this case this man for a number of years has been working, and successfully working.

R11 MR. GOLDBERGER: Fine. We have no problem. Let him sit, and whichever side doesn't want him can challenge him.

MR. BLOCK: While we are all here, I have been looking for an appropriate time to bring this up.

I am sure it is inadvertent. Mr. Mulligan seems to be a communicative kind of person with his face. He is sitting right next to the jury. He is facing the jury. He is smiling at them. There were occasions earlier when we took the recess where it appeared to me not that he was speaking to them but that he was communicating.

I am not saying there is anything your Honor should do at this point, but I wanted to bring my observations to the Court's attention and to Mr. Goldberger's.

MR. GOLDBERGER: With all due respect to Mr. Block's observations, the Court itself smiled on a couple of occasions. I think Mr. Mulligan smiled at the same time. Mr. Mulligan is in no way trying to communicate with the jury. He has been through a trial already and knows the rules.

THE COURT: Let's put it this way. I did have the feeling --

MR. GOLDBERGER: He smiles a lot, Judge. He always does.

THE COURT: I had the feeling he was going to rather substantial lengths to make sure the jury was aware he walked with a cane by taking it from the floor and putting it on counsel table and putting it back on the floor and putting it back on counsel table.

MR. GOLDBERGER: He just went through a major back operation, Judge.

THE COURT: I know. I am reporting to you what I observed. He is putting it up in evidence to make sure, I felt, that one could conclude he wanted to make sure the jury knew he had a cane.

Enough said. There is no other observation than that.

(In open court)

BY THE COURT:

Q Mr. Seamen, do you have any family or close friends in the field of law enforcement?

A The only thing I can say as to that is I don't see the gentleman any more, but my college roommate as an undergraduate became an Assistant DA I believe in the Manhattan DA's office. He worked for Mr. Hogan.

Q You haven't seen him since college?

A I haven't seen him for about ten years.

Q Would that affect your ability to sit here fairly and impartially?

A No, sir.

Q Have you ever been employed by the United States?

A Yes. I worked for the Bureau of Standards when I was 16 years old, about 1952, one summer.

Q Did you have any disputes with the United States?

A No.

Q Would that work for the Bureau of Standards make you lean in favor of the government here?

A No.

THE COURT: Any other questions?

MR. GOLDBERGER: Would you inquire what is the name of the individual that worked at the Manhattan District Attorney's office?

P.J. NO.4: Michael Jubiler. He doesn't work there any more.

THE CLERK: Mr. Seamen, you are excused.

Virginia A. Stephenson, No.4.

BY THE COURT:

Q Miss Stephenson, you are from East 54th Street, New York City?

A (P.J. NO.4) Yes, sir.

Q How long have you lived there?

A Seven years.

Q And before that?

A East 89th.

Q How long have you lived in New York?

A Thirteen years.

Q And before that?

A I am originally from Florida but I came here from Texas.

Q And what do you do?

A I am a classified advertising manager for a newspaper trade publication.

Q What is the newspaper?

A Editor In Publishing is the name of the magazine.

Q How long have you done that?

A Almost six years.

Q And before that?

A I was in an advertising agency.

Q What is your educational background?

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A I am a college grad.

Q Are you married?

A No, sir.

Q Have you ever served as a juror before?

A No, sir.

Q You or your family ever been involved in a criminal case?

A No, sir.

Q Any law enforcement officials among family or close friends?

A My brother is in the army and for a while he was an MP, and I honestly don't know what he does now.

Q Would that affect your ability to sit here fairly and impartially, that association?

A No, sir.

Q Were you personally ever employed by the United States Government?

A No, sir.

Q Have any disputes with the United States?

A No.

THE COURT: Any questions of this lady?

MR. GOLDBERGER: Has she been the victim of a crime?

Q Have you ever been the victim of a crime?

A No, I haven't.

MR. BLOCK: Your Honor, could I belatedly ask you to inquire of the last juror between what avenues on East 89th Street she lives.

Q Where do you live on East 89th?

A I live on East 54th now between Second and Third.

MR. BLOCK: East 89th.

P.J. NO.4: I lived between Park and Lex.

THE CLERK: Miss Greer, you are excused.

Esther L. Barnes, No.3 in the first row.

BY THE COURT:

Q Mrs. Barnes, you are from Fifth Avenue about what street?

A (P.J. NO.4) 68th.

Q 68th and Fifth Avenue in New York City?

A Right.

Q How long have you lived there?

A Twenty-eight years.

Q Are you employed?

A No.

Q Have you ever been?

A No.

Q And what is your educational background?

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA :
:
vs. : 76 Crim. 988
:
DENNIS W. MULLIGAN, and :
JOHN ANTHONY CERASANI, :
:
Defendants. :
:
-----------------------------x

Before:

HON. RICHARD OWEN,

District Judge

July 15, 1977
2:30 p.m.

APPEARANCES

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York
BY: IRA BLOCK, ESQ.,
Assistant United States Attorney

PAUL A. GOLDBERGER, ESQ.,
Attorney for the defendant Mulligan

ALSO PRESENT:
Defendant John A. Cerasani

(Case called.)

MR. BLOCK: Your Honor, I think this is a joint application by the government and by each defendant for a continuance of retrial of Indictment 76 Crim. 988. Mr. Breitbart is not present in the courtroom this morning. I understand from a conversation I had with Mr. Goldberger that Mr. Breitbart discussed the subject matter of the continuance with Mr. Cerasani on the telephone.

MR. GOLDBERGER: If I may add, I discussed it at length on the phone --

THE COURT: Let's ask Mr. Cerasani. Mr. Cerasani, did your lawyer talk to you about continuing the case beyond the 60 days provided?

DEFENDANT CERASANI, Yes, your Honor, he did.

THE COURT: And you are agreeable to doing that after discussing it with Mr. Breitbart?

DEFENDANT CERASANI: Yes, your Honor.

THE COURT: Very good.

MR. BLOCK: The essence of the application is given the Rule 35 motion and the scheduling of that motion, it would appear that it is not possible both to dispose of that motion and to commence the retrial on the counts as to which the jury had a disagreement, prior to August 19, which by my calculation is the 60 days following June 20, the date when the mistrial was declared by the Court. Given those circumstances, it would appear that the interest of the public in a speedy trial is outweighed by the circumstance that in the event the Court were to grant a new trial motion, we might have two or three trials or retrials in this case, rather than only one.

THE COURT: What is the statute?

MR. BLOCK: Section 3161.

THE COURT: Do you join in this, Mr. Goldberger?

MR. GOLDBERGER: I do, Judge, and I have explained it to Mr. Mulligan and he is aware of all the circumstances. It is our feeling that it is in his best interests to waive the 60 day rule at this time.

THE COURT: Mr. Mulligan, you concur in that, do you?

MR. MULLIGAN: Yes, your Honor.

THE COURT: All right. Where is this?

MR. BLOCK: It is on pages 576 and 577, starting at the bottom of 576.

THE COURT: Yes, I make the appropriate finding required under 3161(h)(8) that given the consent of the parties and their counsel and finding that the interests of justice here outweigh the best interests of the public, and the defendants having consented, it is clear that it is more important here to have a resolution of all of the issues, rather than to have to try one piece and possibly later another piece, both in terms of the economics to the defendants and to the government and the use of the time of the Court, the parties and counsel. Therefore, on consent, I order that the 60 days be waived. Do we have to have a definite period?

MR. BLOCK: I think it needs to be with reference to a specific event. I would suggest some time after the Court's disposition of the pending Rule 33 motion.

THE COURT: I shall make it 45 days thereafter. Is that agreeable?

MR. GOLDBERGER: Yes, your Honor.

THE COURT: Is that agreeable to you, Mr. Cerasani?

DEFENDANT CERASANI: Yes, sir.

THE COURT: 45 days after the Court's order and opinion on any motion that is to be made here.

MR. BLOCK: Since Mr. Breitbart is absent, I would ask the Court to ask Mr. Cerasani that since he has an absolute right to be tried by the government within the 60 days or failing that, the case could not go forward.

MR. GOLDBERGER: I was present when the phone conversation took place, Judge, and he is very much aware of his rights.

THE COURT: So that we touch base, you understand that if you insist on it you have a right to be retried on/or before August 19?

DEFENDANT CERASANI: Yes, your Honor.

THE COURT: And that you are giving up this right, and this right would include the fact that if they did not commence the retrial on that date or before, that they could thereafter not prosecute you, you understand that?

DEFENDANT CERASANI: Yes, your Honor.

THE COURT: You are giving up that right?

DEFENDANT CERASANI: Yes, your Honor.

MR. GOLDBERGER: So we are set for the 18th, is that right, Judge?

THE COURT: The 18th.

MR. GOLDBERGER: And I assume the sentence carries over until after that time.

THE COURT: No question about it.

(Time noted: 11:00 a.m.)

jbesb

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x
:
UNITED STATES OF AMERICA
:
vs S76 Cr. 988
:
DENNIS W. MULLIGAN,
:
Defendant.
:
- x

August 18, 1977
3:15 p.m.

BEFORE:

HON. RICHARD OWEN,
District Judge

APPEARANCES:

ROBERT B. FISKE, JR., ESQ.
United States Attorney
BY: IRA BLOCK, ESQ.,
Assistant United States Attorney

PAUL A. GOLDBERGER, ESQ.,
Attorney for Defendant Mulligan

THE COURT: May the record show that I have invited Juror Stephenson to be here during the oral argument that we are about to have.

Mrs. Stephenson, come up if you would, please.

I thank you for coming in at my request and during the course of the oral argument that we are about to have, I am going to ask if you would wait in my robing room.

MS. STEPHENSON: Thank you. I will.

THE COURT: Thank you.

(Ms. Stephenson left the courtroom.)

THE COURT: All right, Mr. Goldberger.

MR. GOLDBERGER: Yes, sir.

Judge, I just want to make sure that the Court has at least had an opportunity to look at the reply memorandum that we filed today.

THE COURT: I did.

MR. GOLDBERGER: Quite frankly, your Honor, we felt that we received the Government's answering papers a rather short time ago and we have not had a full opportunity to explore all of the cases that the Government cited in what appears to be a computer string cite of cases but I would hope that we have responded, I think in some detail, to some of the things that the Government set forth.

Basically, our position is well, I think, set out in both the original papers we filed and the reply but briefly we feel that the defendant Mulligan has been denied a constitutional right to a fair trial by an impartial jury,in the first place, and statutorily been denied the right to challenge prospective jurors in an intelligent and knowing way.

What we have before us, your Honor, is an instance of conduct by a juror during the voir dire which prevented this Court and, more particularly, myself, counsel for Mr. Mulligan, from knowing the full circumstances of this juror's previous conduct which would have at least allowed me to ask the Court to explore it further as the Court did with other jurors.

This juror, as your Honor knows by now, was arrested for a felonious assault in Manhattan, having stabbed a postal employee in the head with some sort of an instrument.

She was arrested in the evening, she was taken to a precinct, a lawyer appeared for her at the precinct. That lawyer asked that a Vera summons -- and I don't know if your Honor is familiar with it, but the Vera summons means that she would be given a summons and a date to appear in court. The lawyer requested that they do that rather than hold her there.

The Police Department refused to give her a Vera summons. They incarcerated her for the night in a detention cell where she was held, and we don't know, because we have not been able to question her under the Court's protective order, she was held in a cell overnight.

She was fingerprinted, she was photographed, she was moved either by paddy wagon or squad car to the courthouse and to say the least, she had a series of bad times, I would think, with the Police Department on that occasion.

Certainly, the denial by the Police Department of her lawyer's request for a Vera summons I am sure weighed heavily in her mind. It would appear that she was present when the request was made.

Now she comes to court in our case as a prospective juror and this Court carefully asked her, as it asked all of the jurors who were prospective jurors in our case, since we had a New York City detective as a defendant in the case, whether or not anybody had ever been involved in a criminal case and, if you recall, your Honor, you defined for the first three jurors that you questioned what you mean by being involved in a criminal case and you said complainant, victim, witness or defendant, and you asked the jurors if they understood that and they said they did and you questioned these jurors very carefully, and when you went to further jurors, your Honor, you said, you asked them again whether or not they had been involved in a criminal case and you said to them, "As I have defined it previously with the other jurors," and they said, "Yes, we understand, your Honor."

Now, if your Honor recalls, we had a Mr. Tambone who was involved in the case. He had a brother who had been convicted of extortion in California and died in jail and brought that to the Court's attention and we had a discussion in the robing room.

We had a Mr. Seamen who I believe, your Honor, the voir dire minutes will indicate was the juror previous to Mrs. Stephenson who was questioned by the Court on the voir dire, and he indicated in open court that he had twice been arrested and appeared before magistrates but the cases had been dismissed, and then he indicated that there were further problems and we took that into the robing room and there was a full discussion.

There was another juror that indicated that his brother had been convicted of an assault or even possibly a murder and had gone to jail for thirteen years and he mentioned the fact that that took place forty years ago but he felt it was important enough in the Court's questioning and instructions to bring that out.

Here we have a lady, your Honor, when you asked her specifically, "Have you ever been involved in a criminal case," the answer was, "No, sir." You asked her whether or not she had ever been involved in a dispute with the United States. She answered, "No, sir" to that.

Well, we know that the person that she stabbed in the head was a postal employee --

THE COURT: For the moment, you can use the word "stabbed" if you want but from this record I get the feeling that she was furious about the exhaust gases of post office trucks left running across the street from her apartment and it is clear that she apparently hit this post office employee in the back of the head, but whether or not she knew she had a ballpoint pen in her hand at the time is not so clear, so your use of the word "stab," it seems to me, goes a little bit beyond what the record will support.

We will find out about that later but, in any event, there is no question she hit a postal employee in the back of the head and happened to have, knowingly or unknowingly, a ballpoint pen in her had which caused him to have three stitches at Bellevue, if I am not mistaken.

There is also no question she is a rather excitable woman.

MR. GOLDBERGER: Okay. Getting back to where I was, Judge, you asked her whether or not there had been any dispute with the United States.

Now, she answered no to that and, quite clearly, this man was a postal employee but perhaps that is ambiguous, perhaps it is not exactly right on point, but there was a further question and I asked the Court to ask the question and that was whether or not she had ever been the victim of a crime and she answered, "No, sir, I have not been the victim of a crime."

Now, if your Honor is familiar with the Government's index of exhibits, there is an opinion of Judge LaFuaci from the Civil Court of the City of New York, and to step back, your Honor, the complaining witness, the postal employee --

THE COURT: He rejects her claim that she was punched in the stomach by a post office employee.

MR. GOLDBERGER: All right, Judge. What happened was that the post office employee when the case was dropped criminally -- and I want the Court to understand how the case was dropped criminally -- the post office authorities failed to notify the complainant to appear in court. He did not appear in court and the case was dismissed for lack of prosecution because the complaining witness did not appear on the first adjourned date, which was eleven days after her arraignment.

He then sued this woman, Mrs. Stephenson, our juror, civilly. There was a trial in which she testified under oath, and Judge LaFauci made a finding that she was incredible, her testimony was incredible, and we have a copy of the opinion in the Government's index.

Her testimony was, if your Honor recalls from the exhibit, not that she attacked this man and stabbed him or struck him or hit him with a ballpoint pen but rather firstly he, for no reason, without saying anything in the first place, punched her in the stomach.

All right. The judge found that incredible, found against her, ruled against her and damages were awarded to the other individual.

So, in your Honor's third question to her, was she ever the victim of a crime, according to her testimony at the case, she was the victim of a crime, an assault by a postal employee. None of this was brought out.

In the Government's memorandum in opposition to our moving papers, the Government says that the term "being a defendant" is an elusive term of art and that we can't expect a lay person to understand the term "being a defendant," and therefore, Mrs. Stephenson might not have known that she was a defendant in a criminal case.

This seems highly unlikely, Judge. If you look at the Government's own index of exhibits, there are at least six or seven exhibits where Mrs. Stephenson is named as a defendant in that case, from the notice of appearance that her attorney filed the first night or the morning of the arraignment to her own appearing under the title "defendant" when she looked to get her fingerprints back after the arrest.

This woman is a college graduate. She works for, I believe, an editor or publisher of a magazine in a responsible job.

For the Government to allege that this woman does not understand the meaning of the term "defendant," when the Court introduced the defendant Mulligan and said, "Would you please stand up, Mr. Mulligan; this is a defendant in the case," she was addressed in the criminal court as the defendant. Her attorney on the adjourned date of the criminal case said, "The defendant, Virginia Stephenson, is ready for a hearing."

THE COURT: Mr. Goldberger, you are in effect saying to me, though, which is the reason that I had her here, that maybe we ought to ask her under oath as to what her state of mind was at the time she was asked those questions.

MR. GOLDBERGER: I don't believe so, Judge. Let me make my position clear to the Court.

I think that this Court should grant this motion to set aside the verdict on the papers that have been submitted to the Court. I don't think there is any need to ask this juror what she had in her mind. She has clearly perjured herself before your Honor on the voir dire.

For her to deny that she was involved in a criminal proceeding when your Honor has before him various materials and indications of the fact that she was arrested on a felony, fingerprinted, photographed, and so forth, for her to tell the Court that she has not been involved is perjury, clearly.

THE COURT: I don't know that that is so clear. And I think if you were her lawyer, you might make a very good case for her.

There is a statute which provides that she does not have to reveal that, the case having been dismissed. She was in court two times and it was in fact dismissed.

There was never a jury, there was never a selection of the jury. She may not have determined that that was being involved in a case as a defendant.

Yes, she may have been arrested, she may have spent the night in the pokey but "Was I a defendant? No, because the case got thrown out."

That is certainly arguable.

MR. GOLDBERGER: What about the juror that testified just before her?

THE COURT: That is arguable and that is why she is here -- in case anybody wants to ask any questions of her -- and that is why she is in the robing room, so she is not affected in any way by what we are saying out here.

You say to me that as a matter of law, I am required to find what you are saying, and that you have no interest in taking her testimony --

MR. GOLDBERGER: No, Judge, let me make the position very clear.

My position is that I feel as a matter of law and the papers that have been submitted to this Court, the counsel for the defendant and the Government in opposition, the Court ought to grant the motion. Failing that, I would ask the Court to allow me to question her. If the Court denies that application, I would ask the Court to allow me to question her to explore more fully and to make a more full record before this Court of this woman's perjury that took place before the Court, the circumstances of the perjury.

Let me go one step further so I don't forget while I am here.

THE COURT: Let's not forget anything you want to argue to me about how this has prejudiced your client. That also is a factor here which you have not touched upon.

MR. GOLDBERGER: Okay, Judge.

First of all, your Honor is aware of the fact that this woman wrote a letter to Mr. Block. I believe that the letter is now, or if it is not, I would ask the Court to make it a part of this record --

THE COURT: I think it is.

MR. GOLDBERGER: All right. Your Honor, I believe, has read the letter and is somewhat familiar with the letter.

The letter indicates, in my own humble opinion -- and I am not a psychiatrist -- in my own humble opinion, the letter indicates that the woman is disturbed without question. The letter indicates that she was under analysis for five years, that she saw this jury deliberation, as she explains in her own language, as some sort of a catharsis of her soul, that she was going to express herself.

She indicates in the letter that she was the one juror that felt that these two individuals, my client, Detective Mulligan, was guilty and that she, herself, had the strength to turn the other eleven people around to convict on the one count of perjury, even though at the end she indicates four jurors still wanted to change their mind, okay?

That is part of the letter that is part of the exhibit that is here.

THE COURT: That means that there were seven that were firmly with her, even at the end, assuming that you give that letter credit, which I don't know that the law permits me to do.

MR. GOLDBERGER: I don't understand why the law would not permit you to view that letter in --

THE COURT: The law does not permit jurors' post trial statements to impeach a verdict.

MR. GOLDBERGER: I agree with that statement, Judge, except where there is clear evidence that there has been improper conduct by a juror, which we have here by her statement on the voir dire, the perjury on the voir dire or by her possible mental state at the time, when you combine all of the factors with this woman, Judge, you have a picture clearly of a woman that should not have been sitting on the jury.

Let's get to the prejudice:

The law allows counsel for the defendant certain peremptory challenges, challenges without any reason.

The Court conducted what I thought was a very extensive and fair voir dire of the jury to allow counsel to make an intelligent decision as to whether or not we should or should not select a juror. We have been denied a fair and impartial jury and I have been denied statutorily the right to peremptorily challenge intelligently a juror when the juror perjures herself and does not give us the true facts.

The prejudice, Judge, in representing a New York City detective on trial, the woman spends the night in jail, the Police Department refuses to let her go home with a summons; they fingerprint her, mug her, take her to the criminal court. We don't even know what happened that night further.

Should this not have been brought out on the voir dire? Should we not have had at the very least a robing room conference as we had with several of the other jurors that indicated that they had family members or were themselves involved in criminal cases? Should I not have had the right at least to have heard this juror explain the circumstances as we now know them so that I could make an intelligent decision as to whether or not to keep her when I have a detective as a client on trial?

Judge, you said yourself you were counsel for the defense for twenty-one years. Would you have not wanted to know the facts that you now know about this juror prior to the time that you made a selection?

THE COURT: You know, you put those kinds of questions in my mind at your peril because if I had been defense counsel, I would have been delighted to have had a juror who had or might have felt herself falsely arrested, which is the very position that your client took on the trial.

Your position was that this man was the subject of a frame and here you would have had a juror who felt that she had been improperly arrested.

MR. GOLDBERGER: Is the Court saying you don't see any merit to the argument that I should be entitled --

THE COURT: I don't see it the way you do. Frankly, I would have been delighted to have her, but that is a matter about which perhaps reasonable men can disagree.

MR. GOLDBERGER: Well, if you recall this, Judge, and I want to make this a part of the record, during the first night of deliberations, this case was given to the jury at approximately one o'clock on Friday. I believe the Court recessed the jury until Monday at approximately nine-thirty or ten o'clock that night. I may be wrong about the precise hour but I think I am approximately correct.

THE COURT: You are roughly right.

MR. GOLDBERGER: At the time the Court recessed the jury for the evening, we were sitting in the courtroom, the jury was in the jury box, the jury got up to leave and Virginia Stephenson, because both Mr. Breitbart, co-counsel in the case with me, and myself clearly saw it, we saw Virginia Stephenson blow a kiss to the prosecution table.

Now, I am not stating this for the first time because your Honor well knows that I stated that to the Court on the following Monday morning and asked the Court, which the Court did, to exclude John Walker, the FBI agent who was at the prosecution table.

We felt, mistakenly, obviously, from the letter that was later written by Mrs. Stephenson, that this juror had some sort of or developed some sort of affection for the FBI agent in the case. As it turns out, obviously, the affection that had been developed was for Mr. Block, the Assistant United States Attorney.

THE COURT: Come on.

MR. GOLDBERGER: I am serious about this and I want it to be a part of the record.

THE COURT: You can make the statement but I find that second inference to be utterly ridiculous.

MR. GOLDBERGER: From the letter where she talks about, "Ira, Ira, I feel close to you now, may I address you as Ira after what we have been through together," I don't think it is ridiculous at all.

THE COURT: I did not witness the alleged blowing of the kiss to Walker. You and Mr. Breitbart said you did and I don't see any way that we can draw an inference upon that, of any feelings towards Mr. Block of an improper nature.

MR. GOLDBERGER: All right. Let me go further, Judge.

In the letter, Miss Stephenson indicates that she is in the process of writing a book --

THE COURT: Right.

MR. GOLDBERGER: -- about Frank Smith, one of the co-conspirators in our trial. She also indicates clearly that she has already -- by the way, Judge, we were not told this when the protective order was issued, that Miss Stephenson had been in Mr. Block's office immediately after the verdict with Mr. Walker and that she had later talked to Mr. Block on Friday, the Friday after the trial, and she indicates in her letter that she now wants the help of her friend, Ira Block, in getting to see Frank Smith so that she can continue with this writing of her book about Frank Smith and that she and Frank Smith are going to split the royalties of this book.

It is clear, Judge, this takes place within four or five days after the verdict is down.

This woman has in her mind as she is sitting in the box deliberating that she is going to write a book about the prosecution's main witness, and you know darned well, Judge, if she is going to get any help from the prosecution in seeing him or talking to him or interviewing him, she is not going to get it if she acquitted the defendants in the case; she will get it if she convicts.

So, when you talk about her motive, what kind of a motive she may have had, what was in her mind as she is deliberating, when she is faced with eleven people as she says in the letter that think differently than she does.

THE COURT: Four.

MR. GOLDBERGER: No, Judge. She starts off -- it is in the letter. It is a part of the Court exhibit.

Read the letter, page 2, the top of the page.

She says that the other eleven, I don't have -- I believe I have a copy of the letter -- let me give you an exact quote, Judge:

"I believe with all my heart that I was right despite the fact that the eleven other people said I was wrong."

Well, that would lead one, I think, if language has its common meaning, to believe that eleven people felt that she was wrong, that eleven people felt that Dennis Mulligan was not guilty but that she felt he was guilty and she prevailed.

THE COURT: Of bank robbery.

MR. GOLDBERGER: It doesn't say bank robbery, does it, Judge?

THE COURT: But you have a unanimous conviction of perjury.

MR. GOLDBERGER: Your Honor, you want to know something. You also have a letter from another juror that says he is heartsick that he did not render the verdict that he thought was right, Mr. Bulos, that he is sick to his stomach that he did the wrong thing. You combine that with the letter that you have from Mrs. Stephenson that she perjured herself and I think we have prejudice to the defendant.

I think we have a situation where the defendant did not get a fair trial and there is no prejudice to the Government. We waived the speedy trial. They have a right to re-try Mr. Mullen and Cerasani any time they wish. We stand ready for trial.

I think it is clear that the Government has tried this case twice and twice they can't convict the defendants of bank robbery and they want to try to sustain the only thing they have gotten, which is a perjury count on the defendant Mulligan but, Judge, not through this juror, not with this kind of a verdict by a juror that is imbalanced, by a juror that lied to you, by a juror that certainly lied to you, Judge.

And I love the Government's memorandum -- if I might comment, your Honor. The Government's memorandum is that the Court used imprecise phraseology, that the Court did not clearly define what it meant when it talked about being a defendant. I assume they were talking about you, Judge, that you were not clear enough for that jury or for those jurors to understand what you were talking about.

I would venture to say that every person in that courtroom understood what you were talking about because the responses were clear from all the jurors when they brought up arrests of brothers of forty years ago but she did not understand what it meant to be a defendant.

Well, I would only ask once again, Judge, I don't want to belabor any of the points I made. I would only ask once again, we have submitted a memorandum, quite frankly not written by me but written by a member of my firm, a man by the name of Michael Young, and I think it is an excellent piece of work and gets to the heart of the Government issues in the answering papers and I would ask the Court to read it carefully before you make any decisions at all in this case.

THE COURT: Mr. Block?

MR. BLOCK: Your Honor, since Mr. Goldberger closed with the memorandum, I would like to say something about that first, though it chronologically comes last. I read it briefly when Mr. Goldberger handed it to me as I came in and I am, I suppose, flattered that the entire prosecution is personified in Ira Block. That is how I am referred to in the memorandum. I deem it to be an exceedingly ad hominem document.

But putting all that to the side, I think it misses the issue that is before the Court on this motion; and that is, whether applying the precedents that have been established in the Second Circuit and with the precedent in the cases in the other circuits to the facts, whether they are disputed or undisputed as they will be if the Court holds a hearing, this defendant has made the requisite showing to entitle him to relief that he has requested, to vacate the judgment of conviction or the jury verdict and for a new trial, and to that extent and with that question in mind, the Government approaches that as a question of law, not one of a result in the case was this, there was one prior trial, let's try to sustain this.

Mr. Goldberger and his client no doubt would have it that because Dennis Mulligan is a defendant in this case, and there now is this piece of information that has come before the Court, everything else ought to be put to the side and Dennis Mulligan ought to have a new trial.

I wasn't intending to bring this to the Court because I wasn't expecting there would be a hearing, but there is information in the Government's possession that the means by which the defense acquired the information concerning Juror Stephenson was less than aboveboard and I won't go forward with that unless the Court thinks it is necessary to go further into that to resolve the motion. I don't think it is.

I think on the papers as they stand, the Court ought to deny the motion. I don't think a hearing is necessary.

MR. GOLDBERGER: We have been accused of something improper, Judge, and I would ask that he spell it out what it is, because we did not do anything improper.

THE COURT: Go ahead.

MR. BLOCK: I have a written statement taken by one of the detectives assigned to the Chief of Detectives Office from the superintendent in Miss Stephenson's building.

Apparently sometime around the time the verdict came in, some representative of Mr. Goldberger bearing Mr. Goldberger's calling card or business card went to the building and started asking questions.

This representative, at least to the building superintendent, said that he was a lawyer, not Mr. Goldberger but working for Mr. Goldberger and that he was there because the Court had asked Mr. Goldberger to find out what could be found out about Miss Stephenson because there was some indication from [illegible] correspondence from another juror in the case that Miss Stephenson had done something improper in the jury deliberations.

Now, it is my belief, based upon what I asked the Police Department to do, that the person who left that card was the gentleman by the name of Leslie Wolf, whom I know to be a former New York City police detective who Mr. Goldberger represented in a trial in this courthouse before Judge Cannella I think sometime last fall. Mr. Wolf was acquitted but he was discharged from the Police Department thereafter.

In fact, another calling card was left with a former doorman of the building who is now a superintendent at another building and the name Les Wolf appears on that.

I also believe on best recollection at least, when we had a robing room conference on the question of character witnesses, Mr. Goldberger made reference to a trial he had in the courthouse before Judge Cannella where Judge Cannella allowed him to call some number, I think he might have had fifteen or sixteen, whatever it is, number of witnesses as character witnesses for the defense and he believed that that contributed to the jury verdict.

The person on trial in that case is, to the Government's best belief, the same person who went out to conduct this investigation and misrepresented himself as an attorney and misrepresented the origin of the investigation.

MR. GOLDBERGER: None of that is true. Almost, I would say 98 percent of what has been said is not true. I am Mr. Goldberger. That is about what is true.

THE COURT: You were not there when this superintendent was --

MR. GOLDBERGER: Les Wolf was never tried in this courthouse, that is number one.

THE COURT: You were not there at the time of the interview so you are in the same position as an attorney who tells a jury every day, "I wasn't there so I don't know what went on."

Go ahead.

MR. BLOCK: In any event, it is accurate that Miss Stephenson was arrested and that all appears in the papers.

With respect to Miss Stephenson's letter, which I think the record ought to reflect was received in our office and the same day as received, a copy was dispatched to your Honor and to Mr. Goldberger and the Bulos letter which was received by your Honor and forwarded to counsel, are incompetent evidence to impeach the verdict. Perhaps for some other purpose -- if there were to be some other kind of proceeding that was not impeachment of the verdict in this case, they might be competent evidence.

But for this purpose, they are not.

THE COURT: Mr. Block, without derailing your thought, which I don't want to do to either of you gentlemen, why shouldn't we take Miss Stephenson's testimony on what she understood she was being asked, what she thought about that event and what her state of mind was with regard to it?

MR. BLOCK: Are you asking me that as a question of law or --

THE COURT: Yes, as a question of law.

MR. BLOCK: I say it is unnecessary for this reason.

THE COURT: Judge Waterman, in his opinion, observes that there is an affidavit of a juror explaining that the juror's state of mind at the time was an erroneous statement of fact and I am just wondering whether it isn't appropriate in this case to approximate that procedure.

MR. BLOCK: There are other cases, not that one, obviously, where in certain kinds of circumstances, the circuit or the district court sustained by the circuit ruled that the alleged misstatement, perjury, misconduct, however you want to characterize it, usually the language comes down to, "Was not inherently prejudicial as a matter of law or did not reveal an obvious disqualification as a matter of law," and the Government's position here is that had Miss Stephenson said all that Mr. Goldberger wished she said at that time, it would not have provided grounds for challenge for cause.

I think it strains credulity, in your Honor's experience and my experience and Mr. Goldberger's experience, to think that the defense would have challenged Miss Stephenson for cause particularly when all the facts about how it was that she came to be arrested came out, the postal service, the postal service watchman and all the rest of that, that shows, if anything, animus toward the Federal Government and federal law enforcement officers, not New York City policemen who were only acting on the complaint of the postal service.

In addition, we say there has been no showing of prejudice, only speculation, imagined scenarios as to how it was that Mr. Mulligan was prejudiced. The bottom line is that because the jury convicted him albeit only on one count, he had to have been prejudiced.

There is nothing whatever suggested, even if you take the Bulos letter and the Stephenson letter and everything else, which your Honor is not entitled to do, but I am saying even if you take that at face value, there is nothing to suggest that there was any improper influence exerted upon any member of the jury other than Miss Stephenson by Miss Stephenson or anyone else during the course of the deliberations. Even Bulos doesn't say that he was physically incapacitated to vote otherwise or was in fear of voting otherwise or anything else.

If you want to characterize it as a compromise verdict, the whole purpose of the jury system or at least the whole practical existence of the jury system depends upon jurors exchanging ideas, discussing their beliefs with each other and coming, hopefully, to unanimous agreement.

That is the purpose of an Allen charge, that is the purpose generally of the Court's instructions on the subject and there is absolutely nothing here to show that the jurors did not carry out the instructions as your Honor gave them to them to the letter.

Indeed, if you want to engage in speculation, I suggest to your Honor that the jury's verdict is explicable on the grounds that it was a very good verdict. They listened to all the evidence. If they had accepted the testimony of Smith or Shannon or both of them, they would have convicted Mulligan and Cerasani of bank robbery or, putting it a different way, whatever they might have thought of that testimony, if following your Honor's instructions about reasonable doubt they thought that the credibility of those two men -- and, obviously, that was the chief issue in the trial and, as you recall the summations, that is what both Mr. Goldberger and Mr. Breitbart, Breitbart perhaps more colorfully, went about to attack before the jury. These men, Smith and Shannon, were not people that you could rely upon. If you were going down on an automobile trip and you came to a precipice and there was a sign, go this way, not that way, you couldn't believe what those people said.

I suggest to your Honor that Mr. Goldberger and Mr. Breitbart did their job well in that regard and there were jurors however many of them we can't be sure, but even assuming there were eleven of them other than Miss Stephenson, who could not find beyond a reasonable doubt based upon the testimony of Smith and Shannon that Mulligan and Cerasani robbed the bank or conspired to do that.

It was a completely different story and different type of evidence, quality of evidence and defense attack of that evidence with respect to the perjury count.

The only thing, as I recall, that was said about the telephone call was "We don't know who spoke," and "The telephone lineman could have gone in there or someone with a telephone lineman's set could have been in there with the alligator clips to the basement, hooked them up to the right place and dialed away Mulligan's number in

New Jersey."

Well, the jury properly rejected that defense theory for what it was: Pure speculation. They had the most credible of evidence with respect to Mulligan's denial, his own testimony under oath before the grand jury, and they put those two things together and all twelve of them unanimously concluded after however much discussion was engaged in that that charge had been sustained beyond a reasonable doubt.

Now, if what Mr. Goldberger is saying is that Miss Stephenson's position or her experience in 1973 was the cause of that series of events in the jury deliberations that resulted in twelve jurors voting to convict, I say to your Honor that that is no different than the legal rule that applies to the Bulos letter and the Stephenson letter.

That is going back into the jury room, taking out the microscope and the sound recording equipment and everything else and, in effect, examining what the deliberations were in that jury room where there is no claim that there was some extraneous outside influence like there was in the last case to present this issue before your Honor, that some juror or someone had referred to newspaper articles about the defendants or that existed in other cases where there was some communication or contact during the course of the deliberations between jurors and persons who were not entitled to be in the jury room, like a prosecutor or an acquaintance of the defendant or an alternate juror or a relative or anything else that came up in the Second Circuit cases -- I think Miller is one of them -- or in cases around the other circuits.

There is a total failure of sustaining the initial burden that falls upon the party challenging the jury verdict. There is a presumption of impartiality and the Government says that has not been overcome in this case.

As examples, your Honor, of situations where, as the facts develop, no hearing is necessary to deny the motion, two cases come to my mind -- I can't give you the exact name but I think you will be familiar -- there was one where it was developed -- the question was asked of the prospective juror whether she was or had recently been employed by the United States Government and it turned out that she had been some years in the past employed by the U. S. Government, including the local office of the Department of Justice, I think it was in Los Angeles, and the case was prosecuted in Los Angeles.

The Court said there that the question was an ambiguous one, the time frame was not specified and there was nothing to show that there was a deliberate effort to deceive by that juror; denied, no hearing.

There was another one that comes to mind that is closer in factual pattern to the Jackson and the DeVita cases that Mr. Goldberger relies on and that was one where the voir dire question was whether any juror or any member of the juror's immediate family had been the victim of an attack upon their person and this juror had a brother, I think, or a sister that had been the victim of a murder and this was not mentioned.

The Court rejected the motion without a hearing and explained that it was incumbent upon the defense counsel to specify precisely what he was referring to by "immediate family;" it well could have been that this juror did not consider a brother immediate family; it might have been limited to spouse and children.

There are other examples, if your Honor goes through the cases.

The reason there should not be a hearing, to come back to your question, is not that the Government is trying to keep something from the Court or trying to work an injustice in this case.

I think Mr. Goldberger and his client have lost sight of the fact that there is a broader issue involved in the administration of criminal justice in this court and in this circuit besides the fate of Dennis Mulligan, though understandably he is preoccupied with that.

Your Honor, jury service under conditions as they exist today is difficult enough.

The point the cases have recognized and the one that comes to mind immediately is Judge Learned Hand's decision in the Jorgenson Ice Machinery case, or maybe it is Jorgenson against Ice Machinery, that if every time there were to be some suggestions raised, some hint or even perhaps something more concrete, that there was something, some emotion, some life experience, something other than only the evidence that was developed within the course of the trial that worked upon a juror's mind when the juror went into the jury room to deliberate, I think his expression was that there would be one case in a hundred where the verdict would stand and he used an analogy that the judges would cease trying cases; they would be like Penelope and her web, always unraveling what had been done.

That is really what the issue is on this motion. Miss Stephenson is down here, so to that extent, it is not an inconvenience. She is already here. If she has been inconvenienced-perhaps she enjoys it; I don't know.

But the fact is that if each time there were a guilty verdict in this court and there was a defendant who had assets to go out and hire a private investigator, whether he would have to go out and hire one by consulting the Yellow Pages or whether his attorney had one who regularly worked for him or whether his own friends were in that business because of what he had done doesn't matter, but if each time there were a guilty verdict, the result we would have, if the courts conducted hearings regularly and entertained the motions, took time and effort to go into everything and explore it fully where there has not been a sufficient showing of prejudice, there would be a motion, maybe more than one motion. in each case because if you investigate far enough and you have enough of a creative mind, you can come up with something that on voir dire wasn't disclosed and you can construct an argument that if this juror had revealed this in response to that question, then I would have had to turn to my client and say, "Shouldn't we give a lot of consideration to challenging this juror for cause and if the judge won't do that, maybe we ought to challenge this juror peremptorily."

What is dispositive in my mind as a practical matter is that if you look at the voir dire questioning, it seems to me what the defense was trying to avoid was any juror who either had a very close association with the United States Government or, two, might be susceptible to what we can characterize as a "law and order complex," somebody who had been the victim of a crime.

I think Mr. Breitbart, and also Mr. Goldberger, was always interested if someone's house had been burglarized, whether they had been home at the time. Presumably that wasn't an idle question.

The purpose of that was whether a scare had been put into the prospective jurors' minds such that when they heard evidence about somebody committing a crime of violence or quasi-violence like a burglary, they would not listen to all the evidence carefully and weigh it dispassionately but this law and order complex would be triggered and they would vote to convict on that ground.

Never once was there any desire by the defense to have the Court or for them to ask directly about arrests. The only side that evinced any interest in that, your Honor, and then it was not arrest but whether there had been a charge placed against a prospective juror, was the Government.

The defense submitted no requests and whatever oral requests were made, as I recollect, had nothing to do with arrest. They had to do with excluding the firm name from the information given the jurors and that type of thing.

I recall the hitch-hiking juror that Mr. Goldberger mentioned. When we were in the robing room in light of what occurred at the first trial with Judge Knapp, there was a juror who seemed mentally unbalanced and this man admitted that he had some problems and had been hospitalized or institutionalized for some time. I suggested, not because I thought that this juror was going to work horribly against the Government's interests, but I suggested that we agree upon an excuse for cause and while Mr. Goldberger sort of leaned that way, the net result of it was that he did not find someone having been arrested who was later not convicted was someone who ought to have sat on the jury. He said whichever side wishes him not to serve, challenge him for cause.

What I am saying here, your Honor, to weave the strands together, is that it is too easy after the fact, Monday morning after the verdict, Tuesday morning in this case, to say, "If I had known this about this juror, then that juror would not have sat and the result would have been different." We are really piling speculation upon speculation upon speculation.

I can know from my position no more than your

Honor can know from his position or Mr. Goldberger from his position without talking to Miss Stephenson what explanation there is for her failure to answer your Honor's question which, with all due respect, perhaps ambiguous is not the right word, it is so all-inclusive as to not fasten a juror's attention upon the particular issue, why she answered as she did and it may be that I am as guilty as I say the defense is in speculating by the first part of the memorandum, though I think statutes on the books and the law of New York and documented facts are less speculation than she spent the night in a booking facility and they did not give her a Vera summons, and all the rest of that.

But if we do that, it is hardly a verdict that could stand and there is no case where able counsel would not pursue the avenue and while I am criticized in the reply memorandum for having plugged in my computer and allowing the computer to mis-cite the cases, I have no hesitancy to say that was not computer generated but the efforts of myself and my student assistant this summer, Miss Leventhal, and I think the number of cases suggest that the issue is not one that arises unfrequently, unfortunately, but it is a pretty uniform approach that the courts take to the matter.

The Jackson and the DeVita case, and with all candor to the Court, I think one or two other cases found and not cited by the defense, but it is the same type of factual situation where there is a juror who had a similar life experience to what is involved in the crime and it is a capital case, and there are new trials awarded but on the one side of those three or four cases, none of them in the Second Circuit, and on the other side is the Uri case and all the other cases we cited respectfully suggest to your Honor that a hearing is unnecessary because you are in as good a position as the Second Circuit was, Judge Waterman, I think Judge Clark and District Judge Galston at the time, to say that it is as likely that if Miss Stephenson harbored any animus from that incident in 1973 toward anybody, that it was not directed toward Dennis Mulligan whom she never knew before, but that it was directed toward the specific police officer, Mozer, who had arrested her, the specific postal service watchman, Scelza, with whom she had had the original dispute and it was with him, not with the United States, or toward postal workers in general or federal employees or polluters of the air or people who make noise late at night -- whatever you want to say -- but to put Dennis Mulligan in the spotlight of what her animus was, I think is irrational and irregular and unwarranted on the facts here.

I just want to add to that, your Honor, something which at the time I thought was a bit -- I don't hesitate to say it -- a bit pedantic but in retrospect, I am glad your Honor did it because it allows us to be sure about this at this point.

As I recall, the verdict that came in or the note was one which said, in effect, "We have reached agreement on only one count and we disagree on the others," and you handed that to your clerk and you asked him to poll the jury and whatever was on that slip, to my recollection, he read and then asked each of the jurors whether that was their verdict and they all said yes, and your Honor's suggestion was that he specifically poll the jurors as to whether or not it was their verdict that Mulligan was guilty on whatever count number it was.

THE COURT: Three.

MR. BLOCK: -- which he proceeded to do, and the jurors all agreed again.

So, whatever the letter may say and whatever Mr. Goldberger may base upon conversations he may have had with the jurors after the verdict or with a Deputy U. S. Marshal, who was in Aldo's, presumably, drinking with them or overhearing their conversation or anything else, on the record twice at what has to be characterized as a very solemn moment, and I don't think anybody had smiles on their faces anywhere in that courtroom at that time, each juror affirmed that it was their verdict that Mulligan was guilty of perjury.

In addition to that, if the Court does decide to conduct a hearing, I reiterate that the Government thinks it is unnecessary and unwarranted on policy grounds for the reason I suggest. We believe that the appropriate way to do so is for the Court, perhaps in the robing room, if there are other persons present here, to ask whatever questions the Court thinks appropriate and perhaps to solicit from counsel the way one would do on voir dire any questions to be asked for the Court's approval and to limit the hearing to that and not make it an adversary cross-examination kind of situation.

Indeed, it is my understanding that that is the definitely prescribed way of doing it in the Second Circuit based upon the Grieco decision and a mandamus decision -- I think it is Grace Lines against Motley -- and another decision, and I think it is United States against Nash.

MR. GOLDBERGER: Your Honor, ten seconds.

I would like to correct Mr. Block in regard to

Mr. Seamen, the juror prior to Mrs. Stephenson. I offered to excuse, with Mr. Block, Mr. Seamen and then the Court felt there was no grounds since the man had been functioning in society for a period of time, to excuse him, even though he had been institutionalized for a period of time. I believe Mr. Breitbart at some point was not willing to go along.

Then there was a comment made and I may have made that, "Well, then, one side or the other will have to challenge." That doesn't mean that I wasn't going to challenge him if the Government did not, so I don't want any inference drawn in regard to Mr. Seamen.

Let me just repeat one position for your Honor and that is we believe you should grant the motion on the papers. Failing to do that, Judge, if you deny it on the papers, we humbly beg the Court to have a hearing and put Miss Stephenson under oath again and this hearing should be an adversary hearing, Judge, where I have the right to cross-examine this woman, where I have a right to question this woman.

If the Court is just going to put her on the witness stand and say, "What did you mean when you said that you were not involved in a criminal case," and she says, "Oh, well, I forgot," or some other ridiculous answer and that's it, then there is no point in having the hearing.

If the hearing is to probe this juror as to why she failed to tell the truth during the voir dire, then by all means, Judge, we should have the hearing and I should be allowed to question the woman.

(Pause)

THE COURT: Gentlemen, I am going to take testimony of Mrs. Stephenson. I am going to do it in the robing room. I am going to put the questions but I will permit counsel to suggest questions to me.

We will retire to the robing room.

(Court, counsel and Ms. Stephenson in the robing room.)

THE COURT: First, Ms. Stephenson, there has been some question, let me put it to you this way, concerning answers that you gave to me when I was questioning you as a prospective juror, as to their accuracy, truthfulness and otherwise.

I am going to ask you some questions about that time and things that logically come behind it today. So, that is what the subject of the inquiry is about and you are perfectly right that you should know as promptly as possible because I invited you down with the possibility that you might be asked questions in this area.

Now, Mr. Goldberger, you want to make a statement on the record?

MR. GOLDBERGER: I do, yes.

Your Honor's law clerk notified me at twelve o'clock today that there was a possibility that there was going to take place -- Ms. Stephenson was going to come down to the courthouse and I ought to be thinking about possible questions to have the Court ask Ms. Stephenson.

I had previously talked to your Honor's law clerk either earlier this week or last week and he indicated to me that there wasn't going to be any hearing, because I asked him that specifically, at least for today; that there was going to be argument on the motion.

I had been in my office since twelve o'clock preparing in handwriting some areas of examination regarding Ms. Stephenson and the issues that are involved or that I think are involved in this hearing.

First of all, I object to the fact that the Court is going to conduct the inquiry and I feel that I should be allowed to question Ms. Stephenson.

Number two, I ask the Court, rather than to do this at ten after four in the afternoon, when your Honor is in Part I with a heavy calendar and a busy schedule, to put this off to another date where I can provide the Court with typewritten questions in the various areas that I think are important to this hearing so that the Court may properly explore what the defendant feels are the issues involved in the hearing.

I don't think that we can do justice to this type of hearing at ten after four when your Honor has such a busy schedule.

THE COURT: This happens to be my regular motion afternoon and the authorities provide that in cases of post trial juror inquiry that the Court should do the questioning in order that there be strict control over the hearing, so I am going to deny your request for personally conducting the inquiry.

Also, it does seem to me, you being a skilled and able trial counsel, that you have doubtless been thinking about this whole area for weeks and are steeped in the cases and what is important under the law and what is not important under the law to be developed.

So, we will go forward.

BY THE COURT:

Q Ms. Stephenson, would you raise your right hand, please.

Do you swear that the answers you will give me this afternoon in this hearing shall be the truth, the whole truth and nothing but the truth, so help you God?

A Yes, sir, I do.

Q Now, when you were selected, when you were -- where is my transcript?

Is that my transcript?

MR. BLOCK: It is mine but you are welcome to it.

A Judge, I may just ask you one question. I really have no idea what is going on and what I am alleged to have answered perhaps improperly.

Should I have an attorney present?

Q Well, I can't answer that for you. Let me put a couple of questions to you and you can, without your answering, and you will see whether you feel that you should have one.

A All right.

Q Apparently, at page 111 of the transcript, you were asked by me whether you or your family were ever involved in a criminal case and your answer to that question was, "No, sir."

Now, it has been called to my attention that in 1973, there was some sort of an incident involving some postal trucks in which you were charged with striking a post office employee in the back of the head. The charge included doing it with some kind of an instrument although, as it would appear, it turned out to be, from the record, a ballpoint pen that you happened to have in your hand.

Now, I want to ask you some questions involving what was your state of mind at the time you answered "No, sir" to the fact of whether or not you had ever been involved in a criminal case.

A Well, it was my understanding, Judge Owen --

Q Do you feel you need a lawyer to handle this area?

A No, I don't think so.

I will tell you exactly what my lawyer had told me.

That case was dismissed, those charges were dropped. It was my understanding from my attorney at the time that this is the same as it never have happened, that he told me that if I were ever asked if I had been involved in a criminal case, I could honestly say no and I said, "Well, what about if they ask me if I was ever arrested." and he said, "You say no, because technically, you were not."

Of course, when you are sitting there, I say, the technicality --

Q And your lawyer's name, if I may ask --

A Yes. It was Robert Dobrich. He was with Hoffinger, Freedman & Roth.

Q So I gather what you are saying to me is that while you had a memory of the incident, you felt that under the legal advice of your lawyer, the charges having been dropped, that you had no obligation --

A Yes, sir --

Q -- to reveal it?

A Yes, sir, I got a letter. Well, I have got a call about the same time he did, about a quarter of twelve, to come down this afternoon so I raced home and tried to find my file on the thing. There is a little green slip of paper from Judge Shirley Levitan saying the thing was kicked out of court.

I did find a letter from Bob Dobrich to the Police Department and I have a copy of a letter to Bob Dobrich from the Police Department and in the letter -- I forgot my reading glasses -- it said that all charges against the defendant, me, were dismissed by Judge Levitan, Criminal Court of New York, and Bob Dobrich told me, because I even asked specifically -- it was strange, about that same time I got the form to fill out for jury duty and

I said, "Well, how will this affect me if I am called for jury duty," and he said, "You answer no."

THE COURT: All right. Do you wish me to mark these for the record?

MR. GOLDBERGER: Yes.

THE COURT: Can I mark these for the record and get copies for you?

THE WITNESS: Yes, sir.

THE COURT: I will mark these Exhibits A and B of this date.

xxx (Exhibits A and B marked.)

BY THE COURT:

Q Now, let me ask you this:

In answering as you did, did you at that time have any views of the merits of this case or any particular personal feelings about any party? Did you harbor any feelings against any party to this case?

A Oh, no, sir.

Q Was there any reservation in your mind about wanting to get on to this jury so that you could get back at the Police Department or any member of it?

A Oh, no, sir. I had no grudge with the Police Department. I was treated very well, quite frankly. It was an experience that I otherwise -- I thought, I don't want to go to jail again but it was an experience. Otherwise, I would have not had --

Q Did that experience in any way leave any mark on you that affected the impartiality that you brought to the case starting in the beginning?

A Oh, no, sir. That -- that's been so many years ago and I have no grudge against the Police Department whatsoever.

THE COURT: Mr. Goldberger, on this subject, do you have any questions that you would like to put to this lady, screening them through me? In other words, suggesting to me questions?

MR. GOLDBERGER: Yes, Judge, I do.

First of all, Judge, I would like you to inquire, if you would, as to how Ms. Stephenson knew to bring down documents from Mr. Dobrich concerning today's hearing if she did not know what it was about.

THE COURT: No, I am not going to do that.

MR. GOLDBERGER: Judge, how in the world could she know to bring down something concerning the 1973 arrest when she did not know what the hearing was about?

THE COURT: Well, let's --

Q Let me put that to you.

What caused you to go home and get these?

A I'll be very happy to answer it. In recent weeks, it has been called to my attention that someone has been investigating me. I was rather alarmed. I felt that it was an invasion of my privacy. I was not told why I was being investigated. I was not told by whom I was being investigated.

I was told nothing, and I in fact called your office and I spoke with your secretary and you were in court and she said she couldn't talk to me and so she said that she would ask you and tell me what she could tell me and she said it had to do with a question that I answered on voir dire, and so I am an intelligent woman and I thought, well, there is only one question that perhaps might be misinterpreted and that would be that particular question.

Q I see. All right.

A I never dreamed anything would come of it but --

THE COURT: Mr. Goldberger?

MR. GOLDBERGER: Yes, Judge.

Would you inquire of Ms. Stephenson whether or not she heard the other jurors who had had either family members or themselves arrested talk to the Court in open court about those arrests?

THE COURT: No. I decline to do that. The reason she has given for it is perfectly understandable. She understood she did not have to reveal it because her lawyer said under New York law, the charges being dismissed, she did not have to reveal it. That is as I understand what she has told me. I decline to ask that.

MR. GOLDBERGER: Would the Court inquire of Ms. Stephenson whether or not when she answered the question in the voir dire had she been the victim of a crime, "No, sir," whether or not she was taking into consideration the fact that she testified under oath in a civil case that she had been attacked by the postal employee?

THE COURT: All right.

Q Do you remember my using the question whether you had ever been a victim, whether one had ever been a victim? I gather from the civil court opinion that you gave testimony to being struck by a post office employee.

Did that --

A That did not enter my mind, Judge Owen. I did not consider myself a victim. That whole thing arose out of the people being victims of the post office running their trucks.

THE COURT: I see. All right.

Mr. Goldberger?

MR. GOLDBERGER: Would you inquire, your Honor, of Ms. Stephenson concerning the emotional state that she had in this case, vis-a-vis she had been in analysis for five years as we know from her letter to Mr. Block and why she saw this as a catharsis of the soul, this deliberation.

THE COURT: I decline to ask that.

MR. GOLDBERGER: Would you inquire how it is that -- was it true that there were eleven jurors who were voting not guilty and she was the one juror, as it turned out, that turned this jury around.

THE COURT: I decline to ask that.

MR. GOLDBERGER: Would you Honor inquire whether or not she is now in the process of writing a book concerning bank robbery and about Frank Smith and was she thinking about that during the course of the trial or the deliberations.

MR. BLOCK: For the record, I object to that line of questioning.

THE COURT: I decline to ask that question.

MR. GOLDBERGER: Would your Honor inquire whether or not Ms. Stephenson was incarcerated for a full night in jail?

THE COURT: I decline to ask that.

MR. GOLDBERGER: Would your Honor inquire whether or not she was searched, strip-searched by the female personnel of the Police Department that night?

THE COURT: No. I think these matters she has acknowledged and was aware of the incident and felt no duty to report it. That is as far as I will go.

MR. GOLDBERGER: Would your Honor inquire of her why she felt she had no duty to report it when other people were reporting dismissals?

THE COURT: She has given answers to that.

MR. GOLDBERGER: You seem to not be allowing me to inquire into even broad areas --

THE COURT: Would you step outside just a minute, Ms. Stephenson, here, and Mr. Dorset will keep you company for a minute.

(Ms. Stephenson left the robing room.)

THE COURT: No, as I see it, I don't see that we have to go much farther with this. The fact of the matter is she knew of it, she has given us an answer, which, if credited, is that she felt she had no duty to report it or to speak about it and under New York law, as the Government has urged upon me and you have not contradicted --

MR. GOLDBERGER: My memorandum does contradict it.

THE COURT: She does not have a duty to speak of it.

MR. GOLDBERGER: May I indicate for the record, that is not the case. My memorandum will indicate to you that the Superior Court -- a court asked the question of an individual, that that individual has no right to say that she has not been involved. That is number one.

Number two --

THE COURT: But the question is good faith in answering here.

MR. GOLDBERGER: Right. Interesting enough, in terms of good faith. It seems that your chambers unknowingly has indicated to this woman that the cause of all this concern is something that she said in the voir dire and she saw fit to go back and to look into this and find out that the only thing that could have been of any problem here was whether or not she had ever been charged with a crime, and interestingly, she comes prepared today with the papers to show that the case has been dismissed.

THE COURT: If she wanted to, she could have come down and looked at the court's file and seen the whole thing.

MR. GOLDBERGER: We don't know that she didn't do that.

MR. BLOCK: Or read it in the New York Post.

THE COURT: Yes, or in the New York Post two days ago.

Unless you have further questions to suggest to me, I don't see any need to inquire further, Mr. Goldberger.

MR. GOLDBERGER: I have, in the broad areas that I have outlined to the Court, I have literally hundreds of questions in those areas that I would have liked to have posed and, quite frankly, let me state the objection. I indicated it outside.

The Court asked the questions of Ms. Stephenson in exactly the way that I indicated outside would be the least beneficial to probing this individual's knowledge as to whether or not she was aware of the fact that she should have told this Court and the individuals involved that she had been arrested and the circumstances of the arrest.

Quite frankly, I think that the hearing has not had the kind of benefit to any of the parties involved, including the Court, that it should have had.

THE COURT: Well, I disagree with you.

All right. We will go back out in open court.

Thank you very much.

MR. BLOCK: Could I ask that so much of the proceedings in the robing room as relates to Ms. Stephenson's arrest, since under New York law it is a privileged matter, that much be sealed, perhaps impounded?

THE COURT: No, because that is a matter of public record now, Mr. Block, and the papers of the parties, so that I don't think you can do that. In fact, I think in fairness to her, I think it should be public.

(In open court)

THE COURT: Gentlemen, I am going to deny the motion for a new trial. I am going to deny it on the ground that the sole attack here that I was required to consider was that there had been a deliberate withholding of relevant information on the voir dire which deliberately worked to the prejudice of the defendant.

While it is the least of the considerations, I find that there is no showing before me that the defendant was prejudiced by these answers, even had one assumed that they were deliberately erroneously or falsely given.

Secondly, I am completely satisfied by the answers that I have received from Juror Stephenson under oath that these answers were not false; they were given by here in a good faith belief which, according to the Government's papers, seems to be founded upon New York statute but, in any event, a good faith belief under the advice of her counsel that, the case having been dismissed a second time around, that she was entitled to treat it or any alleged arrest that occurred in connection with it as being a nullity as if it had never existed. Her answer was given on that basis and was not an effort to mislead the Court.

I further find that on the basis of the answers that I received, there was no animus borne by her consciously or otherwise against any party to this case which she was concealing in order to get on the jury to thereafter exhibit by a verdict.

Given the foregoing, this is controlled by such cases as UNited States against URI, 268 F. 2d. 517, Second Circuit 1959. On the basis of the foregoing, I am denying the motion for a new trial. The foregoing constitute my findings of fact and conclusions of law.

MR. GOLDBERGER: May I indicate for the record that your Honor did not read the defendant's --

THE COURT: I did read it.

MR. GOLDBERGER: It is eleven pages long and I asked you to read it and I believe you read the government's memorandum or have given consideration to it.

THE COURT: I took a recess to read it. I went in and read it through. There are some places where I read certain hyperbolic rhetoric which, I must confess, I read rather quickly because I was not impressed by certain pages that were emotionally inflammatory but I did read it and I gave full consideration to it.

All right. Now, what about sentence? Are you ready for sentence this afternoon?

MR. GOLDBERGER: I am not really prepared for sentence this afternoon. May we have a recess until next week sometime, Judge?

MR. BLOCK: Your Honor, as a personal request, I returned from vacation to attend this hearing personally and I would urge it to be done now since I think much time has passed and Mr. Goldberger is steeped in this case. I don't know what it is that he is not prepared for.

MR. GOLDBERGER: Well, I will tell you, Mr. Block. I don't think the Judge is in the right frame of mind, after the colloquy we have just had, to sentence my client.

THE COURT: I don't understand that --

MR. GOLDBERGER: Judge, during the course of the trial, there were some problems between the Court and counsel for the defendants in the case and at one point, if your Honor recalls, and I know your Honor recalls it, there was some question of an accusation by counsel regarding the Court's prejudice towards the defense in the case.

Your Honor has seen fit to deny this motion today. We have just had a question of whether or not your Honor has read my memorandum. Your Honor has talked about inflammatory remarks, rhetoric.

I would ask the Court not to sentence my client while your Honor might possibly be in a frame of mind that might not be conducive to the type of fair sentence that your Honor might mete out under the normal circumstances.

I am not saying you are in that frame of mind. I am saying there is the possibility that you might be.

THE COURT: Mr. Goldberger, I am not in that frame of mind and one of the things that one must do as a federal judge is to keep one's eye on the ball; and that's a different ball.

I just was responding to your rather forceful statement to me that I had not given you due process of law and it kind of irked me but I can put those things behind me in about three seconds and I already have just as I have when you moved to disqualify me during the trial. Three seconds later, I had thought no more about it and, when you are in the process of trying to do justice --

MR. GOLDBERGER: There is a second ground. We have been preparing in the last few days for the argument on this motion and I had been prepared at one time, by looking at the probation and the presentence reports, to present some views on sentence regarding Mr. Mulligan. My mind is not on those views now. I don't even have that material with me.

THE COURT: Mr. Block, when are you back?

MR. BLOCK: I am back after Labor Day. We can put it off that far and I am sure the defendant consents to the further adjournment.

There is the matter of Mr. Cerasani's speedy trial rights but, even putting those to the side, it seems to me if --

THE COURT: I think those may well be covered by his consent earlier this summer to the processing of this motion, do you not think so?

MR. BLOCK: I forget what number of days it was following the decision on the motion but --

MR. GOLDBERGER: Under any circumstances, I think he would have sixty days from today.

THE COURT: I think so.

MR. BLOCK: In any event, putting that to the side, what Mr. Goldberger was suggesting, aside from your distemper to pass sentence at this time, alleged distemper, is that he has not read the presentence report and I think it would be preferable if we adjourn, and your Honor has another matter or matters, and let Mr. Goldberger go down to the Probation Department with his client, get out the report again and review it.

THE COURT: Mr. Block, Tuesday, September 6, two-fifteen. Courtroom 102.

(Matter adjourned)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

vs.

DENNIS W. MULLIGAN,

Defendant.

---------------------------------x

S 76 Cr. 988

Before:

HON. RICHARD OWEN,
District New York.

New York, September 6, 1977:
2.15 o'clock p.m.

APPEARANCES:

ROBERT B. FISKE, JR., Esq.,
United States Attorney for the
Southern District of New York;
BY: IRA BLOCK, Esq.,
Assistant United States Attorney.

PAUL A. GOLDBERGER, Esq.,
Attorney for Defendant.

(In open court.)

THE COURT: Mr. Block, do you have anything that you want to put in by way of opposition in writing?

MR. BLOCK: Your Honor, the first thing that occurs to me is the supplemental affidavit is incompetent with respect to any of the substantive matter concerning Miss Stephenson's state of mind at the time of the voir dire.

THE COURT: That occurred to me as well, but you are urging upon me that I treat it as a nullity, is that what you aresaying?

MR. BLOCK: That's right. I think it is of no force or effect unless Mr. Goldberger chooses to present some live witness or some other competent proof.

THE COURT: What about that, Mr. Goldberger?

MR. GOLDBERGER: Are you talking about the affidavit to reopen the hearing, Judge?

THE COURT: Yes.

MR. GOLDBERGER: I take it then that the Government is going to submit any answer?

THE COURT: That is their position I gather.

MR. GOLDBERGER: My position is, Judge, that I signed an affidavit and presented it to the Court indicating discussions with Mr. Dobrish. Mr. Dobrish has indicated to me, and I assume if called as a witness at any reopened hearing, would indicate to the Court what is contained in that affidavit, that he at no time instructed Virginia Stephenson that she can answer the questions in the manner in whichshe described that her attorney told her that she could.

MR. BLOCK: Your Honor, the issue it seems to me is far more complex than Mr. Goldberger has put in his affidavit. It's a rather general affidavit. I read him the appropriate sections of the transcript according to Mr. Goldberger and he said he never gave such advice. I would think it's incumbent for Mr. Goldberger to make an offer of proof with respect to just precisely what advice it was if any that Mr. Dobrish gave Miss Stephenson unless he's contending that it's a pure fabrication that Miss Stephenson ever had any conversations with Mr. Dobrish on the subject of the dismissal of the charges against her.

MR. GOLDBERGER: The offer of proof would be, Judge, that he indicated to her at best that she could answer that she'd never been convicted of a crime and the answer would be, no, she had never been convicted of a crime.

THE COURT: Of course she had never been convicted of a crime. There is no question about that.

MR. GOLDBERGER: He at no time advised her according to the conversations I had with him, at no time advised her that she can answer the questions, no, she had never been arrested or been involved in a criminal proceeding and at no time did he advise her that she could state in regard to a jury selection process or jury notice that no, she had not been arrested.

Now clearly that's how she answered the questions in regard to how your Honor posed them at the original hearing.

THE COURT: Do you have the minutes of the jury selection?

MR. BLOCK: I don't think I brought those, your Honor. If they're relevant I can get them in two or three minutes.

THE COURT: Could you do that, please.

(Pause.)

MR. BLOCK: The other point that occurred to me, your Honor, is that unless the contention is that Miss Stephenson fabricated the existence of Mr. Dobrish or an attorney-client relationship between her and Mr. Dobrish whatever it is Mr. Dobrish would say he said is tangentially if at all relevant to what her her state of mind was.

MR. GOLDBERGER: You know I find it very

interesting, Judge, that no matter how much this woam perjures hereself, no matter how far she will go in perjuring herself that this Government, our country right here, will continue to support that perjury.

Now this woman perjured herself in the voir dire and she perjured herself in the hearing before your Honor and made like she didn't even know why she was present, yet brought documents which indicated her previous involvement with the law with her.

Judge, we can wash that away if we want to but it's there, it's evident it's perjury. It's a lot clearer perjury --

THE COURT: You know, if you will allow me to make a statement I am not going to accept your premise. You make a statement that you build upon. I don't accept that. Here is a woman -- maybe she did commit perjury, maybe she didn't -- but the fact of the matter is that her answers having to do with whether she had ever been arrested are supported by the law of New York State. The question is whether or not she got the advice from her lawyer, but whether she got the advice from a lawyer or not her answers were proper under the law of New York State.

MR. GOLDBERGER: That isn't true, Judge.

THE COURT: According to the authorities I was

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furnished on the last hearing which you have not contradicted the statute provices that where there has been no follow-up on this it is as if the arrest had not occurred.

Secondly, this woman went to her lawyer and said, "Can I get my fingerprints back?" and he furnished her a letter. We don't seem to have the letter. I don't know where it has gone, but in any event he furnished her a letter and the fingerprints were returned, and just based upon life experience which I've had in this area a client comes to you and says, "Now nothing happened to this case. Can I get my fingerprints back?"

The answer is "Yes, it's as if it didn't happen."

I can practically hear a lawyer saying that.

You are entitled to your prints back because they dropped the charges the next day. It's as if it never occurred to you. Why should you be stuck with that. I could hear that being said.

So for you to say she perjured herself as a flat pronouncement when A, the law says that she has a right to treat it as if it didn't happen and B, she has letterssaying she got her fingerprints back as if it didn't happen and the Police Department therefore has no more entitlement to them I do not accept that, and I do not want you to go forward with that as a foundation.

If you want to go forward with some other I'll hear it.

MR. GOLDBERGER: But, Judge, that's not what the statute says.

THE COURT: Mr. Block, do you have your brief on the hearing here?

MR. BLOCK: Yes, your Honor.

MR. GOLDBERGER: If you recall, your Honor, I can't quote the statute verbatim, I don't have any papers here, but it talks about the fact that if a Superior Court requests an answer in regard to this area that that would be an exception to answering or thinking that you didn't have to make the statement that you'd been arrested or been involved in a criminal case. I believe that the language of the statute is sufficiently clear and talks about a Superior Court. I would assume that a United States District Court would be considered a Superior Court under those circumstances.

THE COURT: I don't know that she regards that as a Superior Court under those circumstances and the basic fact we're dealing with here is her good faith.

MR. GOLDBERGER: Judge, you just quoted the statute to me as being a point in her favor. Now I'm quoting the statute to you and telling you that she doesn't fall within that statute.

THE COURT: Where do you find that?

MR. GOLDBERGER: I don't have the papers with me today, your Honor. Whatever the section is I believe the Government's got the section in their papers.

MR. BLOCK: It's in the appendix, your Honor.

MR. GOLDBERGER: I believe also comment was made upon this in our answering memorandum to the Government's papers, Judge, in regard to that section.

THE COURT: 16.60 if I can credit the accuracy of the Government's brief in this regard says that where a criminal action terminates in favor of a person the arrest and prosecution shall be deemed a nullity. Shall be restored in contemplation of the law to the status he occupied before the arrest and prosecution, except where specifically required or permitted by the statute or except upon specific authorization, not when she is before a Supreme Court, but specific authorization of a Superior Court no such person shall be required to divulge information pertaining to the arrest or prosecution.

MR. GOLDBERGER: Yes, that's the language, Judge, as I recall.

THE COURT: That doesn't say when she is before

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a Superior Court she has to say, "I was arrested." That says if a Superior Court authorizes that to be spoken.

MR. GOLDBERGER: Judge, perhaps I misunderstand the whole process then. I mean, your Honor conducted a voir dire. We had jurors, the juror in front of her answer, "Yes, I've been arrested twice. I went before Magistrates. The cases were dismissed."

We had a robing room conference with people that had brothers involved in the criminal law. Here is a lady that stabs a postal employee in the head and is arrested --

THE COURT: She hit him in the head with her fist because he left his engine running with the gas seeping into her apartment, and she had a ballpoint pen in her hand.

MR. GOLDBERGER: She was arrested for felonious assault, Judge, and held overnight.

THE COURT: It turns out she had a ballpoint pen in her hand. She is a writer. She didn't like the stink of gas across the street. The engines were all running. She goes over. She has an argument with the postal employee. She is an excitable woman and she whacks one of them in the head and she happens to have a pencil or ballpoint pen in her hand.

The way I read the felonious complaint you would have thought she had a butcher knife or a baseball bat or a crowbar.

MR. GOLDBERGER: The man got some stitches at the hospital, Judge.

THE COURT: That's correct. And kids get stitches in their heads from falling off bicycles. So the mere fact that there are stitches and the mere fact she whacked him in the head does not make it a case of hitting somebody with an instrument with intent to murder or otherwise do serious bodily harm which was the impression which was endeavored to be created by the mere complaint itself, which was what I was furnished with the first time.

Now as I read this language I don't see anything in here requiring her to answer by reason of the fact she is a Superior Court this otherwise than what the statute says, and that is she is restored to the status she occupied before the arrest.

If you can argue to me anything further from that I would be delighted to have you do it.

MR. GOLDBERGER: Judge, I quite frankly with all due respect to the Court the way your Horor has framed what happened with this woman in the assault I think it would be a waste of time to argue go your Honor in regard to this woman perjuring herself. Your Honor has made up his mind --

THE COURT: I haven't made up my mind.

MR. GOLDBERGER: It seems to me you made up your mind prior to the time we had the hearing.

THE COURT: Mr. Goldberger, I haven't made up my mind, but you come in here today in a very effective attorney-like manner urging upon me at top decibel that this woman is a perjurer. I do not accept that upon the state of this present record, nor do I accept on the state of this present record the representation that is going to be made as to what this attorney would testify because I have just the boldest of assertions on your part that he says he didn't give her "such advice".

I don't know what the conversation was. I don't know whether you endeavored to get an affidavit from him and he wouldn't give it to you. I don't know whether he's available, whether he said he would come or would not come. I don't know anything except you say he says, "I deny it. I did not give her that."

MR. GOLDBERGER: Judge, he's like anybody else. I would assume that he has to be amenable to the process of

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this District Cou t.

THE COURT: Did you ask him for an affidavit?

MR. GOLDBERGER: I did not, Judge.

THE COURT: Why did you not ask him?

MR. GOLDBERGER: I indicated to him when I talked to him onthe phone that depending on what your Honor ruled that he may well have to come to the United States District Court and he may well have testify as to what he indicated to me and he told me that if that is the case he would.

As a matter of fact he indicated to me that he had told Virginia Stephenson that there may be a problem in his acting as her counsel further because he might have to come to court and testify, and I don't know if any affidavits state it but he talked to her twice that day, once prior to the time that she actually went into that so-called hearing that we had and secondly after the hearing when she called him back to tell him that it didn't appear there was going to be any problem in regard to what she had said on the voir dire.

MR. BLOCK: Your Honor, if I may, perhaps we can cut through it.

As I recall your oral decision rendered from the bench at the close of the hearing there was an alternative ground which was even if you had found lack of good faith in the answer Miss Stephenson gave the defendant hadn't made the requisite showing of prejudice.

I don't see that's at all changed by whatever Mr. Dobrish would or would not say or when he spoke to her or any of that.

THE COURT: Mr. Goldberger, what did you and Mr. Dobrish say to each other recalling as best you can what you said and what he said?

MR. GOLDBERGER: I talked to him twice on the phone I believe, Judge. The first time I talked to him was the day of the hearing. I called him late in the afternoon after we had come back after the hearing. I happened to know one of the people in his firm, a man by the name of Murray Roth, one of the partners in the firm I believe at least from the heading of the firm. I noticed that I knew Mr. Roth from the fact that in one of the Government exhibits, the notice of appearance that Mr. Dobrish had filed on behalf of Miss Stephenson in the criminal case, I believe contained the name of the firm.

I called Mr. Roth, and I said, "Is a Mr. Dobrish still with you, Murray?"

He said, "Yes, he still is."

I said, "Could I talk to him? It's about a matter that I have in the District Court in New York."

He said, "Certainly."

Put him on the phone.

I related some of the background to him of what had taken place.

I asked him first if he had represented the woman. He said yes. I asked him whether or not he recalled the incident. He said to some extent that he did recall representing her. I started to ask him some further questions.

He said, "Doesn't there appear to be a problem of confidentiality between me and my client?"

I said, "I don't think so."

I said, "Since your client has disclosed now, has published in effect what the conversation was between you and her I don't there is that confidentiality," and I don't think I went so far as to say, "You could compelled," but I said, "I think it's all right ethically for you to state what conversation there was if any."

I believe at that point I had asked him if he recalled the incident in terms of court and what happened and what discussions he had with her. He said to some extent that he did. He indicated that he had had a phone call from her.

His first conversation indicated to me that there probably had been only one phone call. He didn't mention the fact that she had called twice during the day. He indicated that he had some conversation about a problem that she may have been having concerning some questions she had been asked a juror in a Federal case. He indicated to me, and at that point I sort of interrupted him and said to him, "I'd like to know if you could recall what it is if at all you advised her concerning the dismissal of her criminal case in the Criminal Court of the City of New York?"

He indicated that he had told her that the case was dismissed, that she was not convicted of a crime. I asked him if he had gone further than that. He said he didn't believe so. I believe that was basically the conversations as I recall at the first time.

The second time I called prior to submitting the affidavit to the Court and we went into at length a little bit further and I think my affidavit more clearly reflects the conversation than my memory at this point, so if yo9u Honor wishes to just read the affidavit that I've submitted I think it's a better recollection than I have presently now.

THE COURT: Well, the affidavit is very brief. It says that you read him portions of the hearing transcript which are specified and she asked him --

MR. GOLDBERGER: Excerpts from portions, Judge, yes.

THE COURT: She asked him specifically about how her arrest would affect her if she were called for jury duty and he told her that she should say no, according to this, that if she were ever asked if she had been involved in a criminal case or been arrested she should say no and that her arrest would not affect her if she were called for jury duty.

MR. GOLDBERGER: That's what she was saying, Judge.

THE COURT: That's what you read to the lawyer?

MR. GOLDBERGER: Yes.

THE COURT: What did you say to the lawyer after reading that to him?

MR. GOLDBERGER: I asked if he had made that kind of statement to her. He indicated to me no, if I recall.

THE COURT: What was the language he indicated to her, no?

What was the language from which you draw that conclusion?

MR. GOLDBERGER: I would think no was the language from which I drew the conclusion, Judge. No usually means no.

As a matter of fact I think, Judge, he may gone as far as to say, "I don't think I ever advised anybody who had been arrested not to say that they had been arrested," he said, "because that's not my understanding of the law."

Now I don't know that I included that but if I recall he may have even gone that far with me on the telephone.

THE COURT: Did you ask him anything else?

MR. GOLDBERGER: I asked him some questions about her, yes, Judge, nothing in too much depth, there was a question concerning her, shall we say, her behavior.

THE COURT: Is Mr. Dobrish available?

MR. GOLDBERGER: I have no idea, Judge. Are you talking about today?

THE COURT: Yes.

MR. BLOCK: Your Honor, I had a telephone conversation with Mr. Dobrish around lunchtime today. It was twenty aftet twelve. He told me number one that I really called him to inquire whether he was coming down to court today and he said he had no idea. He hadn't heard from Mr. Goldberger in a little bit.

I asked him if Mr. Goldberger ever told him that Mr. Goldberger was going to submit an affidavit to the United States District Court concerning the subject matter of their prior conversation. He said no.

When I asked him about his availability in the event he might have to come down he said he was, he had a court engagement this afternoon. If he were to receive a subpoena he would have to free himself. To the extent he answered that way I assume he's available to process. I don't see it as the Government's obligation to serve him though.

MR. GOLDBERGER: I just assumed that I didn't know what was going to happen today, Judge. Usually when you submit an affidavit in a motion to reopen the hearing usually you receive something from the opposition, "Yes, we oppose. No, we consent." I received nothing from the Government.

MR. BLOCK: Mr. Goldberger's papers were untimely. I don't see how he's prejudiced.

THE COURT: In reading from them they're inadequate to raise an issue because they're hearsay.

MR. BLOCK: If he truly believes what he said about the Government's position he could have assumed that the Government would oppose it.

MR. GOLDBERGER: I truly believe what I said about the Government's position, Mr. Block, and not only during the hearing but during the trial as well in regard to Mr. Shannon's testimony.

THE COURT: Mr. Goldberger, suppose I adjourn this matter till 4.45 and I will direct either of you or both to communicate to Mr. Dobrish the Court's direction that he is to appear at that hour?

MR. GOLDBERGER: On the possibility, your Honor, that he is not in his office this afternoon, that he is not available this afternoon.

THE COURT: Why don't you report that to me?

MR. GOLDBERGER: Very well, Judge.

THE COURT: All right. We will adjourn it until 4.45.

(Recess.)

(In open court.)

THE COURT: Is Mr. Robert Dobrish in the courtroom?

MR. DOBRISH: Yes, sir.

THE COURT: Yes, sir.

Would you come up here for a moment if you would and I'll put you under oath if you don't mind and ask you a few quetions.

(Robert Dobrish was duly sworn.)

MR. GOLDBERGER: Your Honor, before you begin Mr. Dobrish just asked me to ask the Court if he has asked any questions concerning conversations that he had with Miss Stephenson he'd like it from the Court that it's all right to answer those questions that she has divulged the information so that he is not breaching any confidentiality.

THE COURT: I understand.

MR. GOLDBERGER: Thank you, sir.

BY THE COURT:

Q Mr. Dobrish, you are a lawyer in the State of New York?

A Yes.

Q Where do you have your office?

A 10 East 53rd Street.

Q When were you admitted to practice?

A 1965.

Q Along the way you represented one Virginia Stephenson, right?

A Yes.

Q Mrs. Stephenson gave testimony before me on August 18, 1977 having to do with the fact that you were her lawyer in an assault case where she was charged with striking a postal employee in the back of the head, right.

A Yes.

Q You were her lawyer?

A Yes. The firm was her lawyer and I was the attorney in the firm who handled the case.

Q I see. You went to court with her for two days or one day or whatever?

A I can remember being in court with her at least one day.

Q I think the record shows that the case was dismissed for failure to prosecute or something like that ghe second time it was on. She was held overnight one night. She was released. The case was set for a week later or so and you and she came back a week later, is that right?

A It sounds right. I remember being in court one time with her and I remember the case being dismissed.

Q Following that it is her testimony that she asked you in words or in substance about how that left her as far as being and having to tell the world that she had been arrested was concerned. She was concerned because the case had been dismissed and if somebody asked her if she had been arrested what was her response to be.

She said, "He said, 'You say no because technically you were not.'"

Do you remember having any conversation with her about this general subject matter?

I have no specific recollection of any conversation that I had with her about this subject.

Q What you're telling me is you could have one but you don't remember it?

A Yes.

Q Or you could not have had one and you don't remember?

A Such a conversation could definitely have taken place.

Q I see.

A I do not recollect the specific conversation with her at that time. I don't know if she is referring to a conversation that took place after court or at some future time on the telephone or what. I do not have a specific recollection of that conversation where or when it took place but it certainly could have taken place.

THE COURT: Mr. Block, did we ever find those letters?

MR. BLOCK: Your Honor, I looked through my papers. I do not have them. My recollection is that one paper was a carob copy or a Xerox copy of a carbon copy of a letter from Mr. Dobrish to the Police Department transmitting certain materials and requesting that the Police Department follow the procedures set forth in Section 79-E of the Civil Rights Law.

The other exhibit was a copy of a communication addressed to Mr. Dobrish from the Police Department saying in substance, we have processed the request. The papers are available. Please call for them at your client's earliest convenience. But I do not have them.

I recollect having received them from Mr. Dorsa. I read them. I remember passing them to Mr. Goldberger. I have no recollection after that point.

BY THE COURT:

Q Do you have a recollection of working up some correspondence in order to get fingerprints and other things back?

A Well, generally after we obtain a dismissal we attempt to get fingerprints of our clients back. I don't have a specific recollection of doing it for Miss Stephenson but I'm sure that it happened.

Q That's your practice in your firm?

A Yes, it is. I would say, your Honor, that I went to look for the file that we have today but unfortunately we just moved a lot of files over to storage and so our, this particular file is in storage and I have not been able to locate the file.

Q At some point Mrs. Stephenson testified she said that she had been called to jury duty by receiving a form and she specifically spoke to you saying, "How will this case I've had affect me if I'm called for jury duty?" and her answer continues that you said, "You can answer, 'No'."

Do you have any recollection of such a conversation.

A I have no recollection of such a conversation. Now this has distressed me somewhat because you know I've known about this proceeding for a while and I have had conversation both with Mr. Block and Mr. Goldberger trying to remember what happened. I have no specific recollection. As a result I've looked at, I've looked at the

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statutes to see what I might have said.

It's conceivable to me that if she called me after the new statute went into effect and asked me at that time whether or not she would have to answer that question how she would answer that question it's conceivable that I might have said to her, because of the new statute, there's a question as to whether there is an intent to answer that question yes or no about the arrest. It's conceivable as I say.

I cannot remember ever telling a client whether the case was an adjournment in contemplation of dismissal, whether there was an application for an expungement of records, whatever, I cannot remember ever telling a client that the client did not have to answer that question in the affirmative, "Have you ever been arrested?"

I have no recollection of ever telling a client clearly, "You do not have to answer that question." I can remember specifically advising clients that there was a question as to whether or not they had to answer that question in the affirmative. That it was a question in my mind.

I have told clients that in the event that the question is ever asked you should call the American Civil Liberties Union and try to get an answer from them or have them come in and make sure that the question is not asked, because I don't believe the question is a proper question. However, I have no recollection with regard to Miss Stephenson or any other client other than telling them, regardless of the disposition on a criminal case, that they did not have to answer the question, "Have you ever been arrested?" in the affirmative if in fact that did happen.

Q You have no recollection of telling Mrs. Stephenson anything on this subject one way or the other?

A No, no specific recollection.

THE COURT: All right.

Mr. Goldberger, do you wish to ask any questions?

MR. GOLDBERGER: Just a few.

DIRECT EXAMINATION

BY MR. GOLDBERGER:

Q Mr. Dobrish, you remember the conversation we had on the phone, is that correct?

A Yes.

Q We had two conversations as I recall on the phone, is that correct, sir?

A I believe so.

Q The second time we talked on the phone you had spoken to Miss Stephenson some time during that day either once or twice?

A Twice, yes.

Q Could you relate to the Court if you can recall when she called you for the first time that day?

A Earlier in the day she called me up on the
telephone and said that she was down in court. I had
been away on vacation and she had spoken to an associate
2 in my office about something. She called me from the
court, told me that she was supposed to go in to see the
judge and did she need a lawyer, and they were going to ask
her questions. And she told me that there was a question
about what she had answered with respect to the voir dire.

I told her that she should ask the judge whether she needs a lawyer and I thought the judge would advise her. She asked me something about my representing her. I told her that I did not believe that I could possibly represent her since there was the question as to what advice -I had given her and if she needed a lawyer she would have to get another lawyer.

Q Let me interrupt you for one second, with the Court's permission, Mr. Dobrish. You said there was a question about you didn't want to be her lawyer because there was a question about what advice you had given her and that might become part of the situation?

A Right.

Q So she had raised with you during this initial phone conversation the problem about whether or not she had been arrested and how she had answered that question?

A Yes, I think she did.

Q Did she indicate to you that she was taking any documents to court to show the Court?

A I think that she read me a part of a letter that I had written to her and it was a letter that I think had to do with the return of fingerprints, that I believe that that is so. I did not take notes of the conversation.

Q It is clear, Mr. Dobrish, that when you talked to her on the phone the first time you did not advise her as to how to answer any questions that were put to her by the Court at that hearing, is that correct?

A Absolutely.

Q Some time later that same day you received another phone call from her?

A Yes.

Q Could you relate as best you can, sir, the substance of the conversation?

A She called me up. She told me everything was all right. She didn't tell me what had happened in the courtroom or anything. She said just "Everything was fine. It's okay. Good-bye." That was it.

Q Mr. Dobrish, were you aware of any statute that existed in 1973 or 1974 that allowed a person to answer a question with regard to whether or not they had been the subject of a criminal proceeding or an arrest in the negative?

MR. BLOCK: Objection, your Honor, relevance.

MR. GOLDBERGER: May I make an offer of proof, Judge. The statute that we're talking about, your Honor, came into play September 1 of 1976. My understanding is that there is no predecessor statute.

I would be hard to advise somebody under a statute that they didn't have to answer such a question in the affirmative when there was no such statute in existence until two years later.

MR. BLOCK: Your Honor, those are all the questions of law that have been before the Court and Mr. Goldberger has had the opportunity to advance whatever arguments he wants. What this gentleman's knowledge or lack of knowledge may be seems to me doesn't advance our inquiry. Whether he was up on the statute or down on the statute so to speak --

MR. GOLDBERGER: I think it's relevant, Judge, as to what he would have advised Miss Stephenson.

THE COURT: He has told us that. I will let you have your answer nevertheless.

Objection is overruled.

Q Can you answer the question, Mr. Dobrish, were you aware of whether there was or was not a statute in 1974?

A A statute with respect to what?

Q A statute with respect to allowing a person to answer no in regard to whether or not they had been the subject of a criminal proceeding or an arrest?

A I was not aware of any such statute. I'm not aware of such a statute now by the way. I am aware of the statute you're talking about, but I'm not aware that that statute says that a person can answer the question no. It's not that clear to me.

Q Prior to the time you just testified now here, Mr. Dobrish, you had a previous conversation with me; is that correct, either in the hall or right here in the courtroom?

A Yes.

Q It is a fact, sir, that I informed you that when I had this phone conversation with you I had another attorney in my office listening on an extension?

A Yes, you did.

MR. GOLDBERGER: I have no other questions.

THE COU[illegible]. Block, any questions?

MR. BLOC[illegible] Very briefly, your Honor.

CROSS EXAMINATION

XX BY MR. BLOCK:

Q Mr. Dobrish, you used an expression earlier in your testimony in answer to the Judge's questions, "the new statute". Can you explain to us what statute you were referring to when you used the adjective "new"?

A Yes. As I understand it Section 160 of the Criminal Procedure Law has been changed. It was changed about effective about a year ago and it allows for the expungement of a person's record after the dismissal. It says I believe that you're supposed to go back to the status quo prior to the arrest, but as to what that means I don't know with respect to this particular issue.

Q I'd like to show you page 11 of a document which is a memorandum in the record. There is a statute quoted in single spacing in the bottom of that page. Is that the statute that you refer to as the new statute?

A Yes.

Q Or at least a portion of it?

A Yes.

Q At any time during your conversations with MIss Stephenson did you ever ask her to tell you what her understanding was of whatever legal advice you had given her on the subject of the dismisssal of the charges against her?

A I have no recollection of that.

Q So you don't know what her state of mind or state of understanding was of the legal effect of the dismissal of the charges, is that correct?

A Would you like me to comment about that?

Q No, I'm not asking you to speculate about her. I'm just asking if you know.

A I don't know what her state of mind was, no.

MR. BLOCK: Thank you.

BY THE COURT:

Q You say that at some point you have a recollection of advising clients that maybe the arrest is expunged and maybe it isn't, but they should go to the American Civil Liberties Union for --

A Well, your Honor, this has always been an extremely difficult issue I think so far as I was concerned. It's been an issue that has been of interest to me. It's something I talked to the Civil Liberties Union about in the past before this new statute.

I don't believe the question should ever be asked but there isn't a statute so far as I'm concerned that says if you are asked that question you can answer that question no. This comes close and maybe this says that. I'm not absolutely certainly Certain that it does. But before this statute I don't think that there was such a statute. The closest thing so far as I was concerned was the adjournment in contemplation of dismissal which allowed for the sealing of the records and the purpose of that as I understood it was to make it a nullity as if it hadn't existed.

Q What were the circumstances of the dismissal here? This was for failure to prosecute?

A Yes, sir, it was not as I understand it, it was not an adjournment in contemplation. This was a dismissal and we had to seek the return of the fingerprints and the photographs.

THE COURT: Anybody have any questions?

MR. BLOCK: Nothing further.

MR. GOLDBERGER: Nothing further.

THE COURT: Thank you very much.

(Witness excused.)

THE COURT: Does anybody wish to argue to me on this point on the motion?

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MR. GOLDBERGER: I do, Judge.

THE COURT: Very good.

MR. GOLDBERGER: I repeat what I said previously that Juror Stephenson perjured herself twice, perjured herself at the voir dire and perjured herself at the hearing.

Mr. Dobrish has stated that at no time in his career as a lawyer advising clients who are involved in criminal cases has he ever at any time advised somebody that they can answer the question with regard to whether or not they have ever been arrested know when in fact they have been arrested.

Clearly that is what she testified to under oath in the robing room in the back of Room 506. She has perjured herself again. I mean it must stop at some point. I would suggest to the Court that the Court should grant the motion to set aside the verdict on the grounds that it's been proven clearly here in the first instance that she perjured herself on the voir dire and in the second instance that she perjured herself before the Court.

MR. BLOCK: Your Honor, I think the answer to that is very simple. Number one, we just heard Mr. Dobrish say that he has no recollection one way or the other of any conversation or advice that he gave to Miss Stephenson on the subject of her case and, number two, he said it was conceivable to him that he may have had an inquiry from her when she received the notice to appear for jury duty or the jury qualification questionnaire, and he then may have said under the new statute, which we have developed as Section 160 of the Penal Law, he would have told her that she wouldn't have to answer anything about arrests.

In fact, your Honor, as your Honor may be aware the jury qualification questionnasire doesn't ask about arrests but putting all that to the side I don't think there is any inconsistency between Mr. Dobrish's testimony and what Miss Stephenson testified to in the robing room and your Honor's findings particularly since the relevant issue as I urged upon you before is not specifically what it is Mr. Dobrish said or didn't say but what Miss Stephenson's understanding of whatever conversation or remarks Mr. Dobrish made.

There is certainly some room for a layman to take away from a conversation with a lawyer an understanding which may not be on all ten points of the law, only nine of it, and she came away and said her lawyer told her she wouldn't have to answer the question as if it didn't

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happen and I think we had Mr. Dobrish explain while he may have some professional doubt about whether the statute does go that far he did at least raise the possibility the statute went that far with the juror.

There is just no inconsistency whatever betweenyour Honor'r finding previously about Miss Stephenson's state of mind and what Mr. Dobrish said, and even if there were, and I emphasize there isn't, there has been no further showing made of any prejudice to Dennis Mulligan from Miss Stephenson's participation on the jury and that really is the sine qua non for relief of the kind requested here.

(Continued on next page)

MR. GOLDBERGER: Your Honor, may I just bring to the Court's attention I think Mr. Block misunderstands one of the factual issues involved and I think the Court should understand that. On page 47 of the minuteds before your Honor, this jury notice, Judge, didn't come in 1976 after the statute was in effect. If you will read the bottom of page 47 you will see that this jury notice came at about the time that Judge Levinthin dismissed the case in the Criminal Court which was in 1973.

So Mr. Dobrish couldn't be advising her about a statute in 1973 or 1974 that didn't exist until 1976. So when Mr. Block says to the Court well, Mr. Dobrish may have had this statute in mind when he advised her about this jury notice, the jury notice came as I understand it from what she says here, "It was at about the same time I got the form to fill out for jury duty." She is referring to when Judge Levinthin dismissed the complaint in the Criminal Court. You see where I am talking about, Judge, on the bottom of page 47? There was no statute no statute then.

We don't have a statute until two years later. So what is Mr. Block talking about?

THE COURT: I see what you argue from this. I am not sure that conclusion necessarily follows but I see what you are arguing from. All right. I will take a recess for five minutes.

(Recess.)

(In the robing room.)

(At the Court's request a portion of the record was read by the reporter.)

(In open court.)

THE COURT: I have before me a motion to reopen the hearing on defendant's motion to set aside the jury verdict. The essence of it is the claim that Juror Stephenson to the defendant's prejudice perjured herself when responding to a question as to whether she had ever been involved in a criminal case by denying the fact of an arrest.

The undisputed fact is that her information about denying or her information about her legal right to deny this obviously had to come to her from somewhere. It did not come out of the thin air. She was asked about this. She immediately said, "Yes, I knew about that but I believe I did not have to say anything about it."

There was no hiding the fact of her knowledge of the arrest. So it is a question then of her good faith in denying it.

As I say she had to get the information on which she based her right to deny it from somewhere. Also it is crystal clear that the case was speedily dismissed for failure to prosecute. It would appear reasonable men seem to be disagreeing but it would appear more likely so than not that certainly on the state of the law today she is right to the extent that she has a right to deny it. Her attorney wrote and got her fingerprints back for her which is obviously based on a believe on both their parts that she should be put in the position as to where she had been before the fingerprints had been taken.

I have heard both Mrs. Stephenson and Mr. Dobrish, the attorney, and I credit her good faith in the answer that she has given me and her truthfulness in those answers, particularly given the fact that Mr. Dobrish really does not have a recollection of these events. Indeed, an answer which I have had reread to me from very early in this examination under my questioning which I thought was extremely non-leading was fully supportive of this view and I am going to incorporate those questions into this record at this time.

Would you read those questions and answers so they may be truly part of the record.

(The reporter read the following:)

"BY THE COURT:

"Q Following that is her testimony that she asked you in words or in substance about how that left her as far as being and having to tell the world that she had been arrested was concerned. She was concerned because the case had been dismissed and if somebody asked her if she had been arrested what was her response to be.

"She said, 'He said, 'You say, no, because technically you were not.'

"Now do you remember having any conversation with her about this general subject matter?

"A I have no specific recollection of any conversation that I had with her about this subject.

"Q What you're telling me is you could have had one but you don't remember it?

"A Yes.

"Q Or you could not have had one and you don't remember?

"A Such a conversation could definitely have taken place.

"Q I see.

"A I do not recollect the specific conversation with her at that time. I don't know if she is referring to a conversation that took place after court or at some future time on the telephone or what. I do not have a specific recollection of that conversation where or when it took place but it certainly could have taken place."

THE COURT: Further I think it appropriate to observe that to Miss Stephenson this was a rather important conversation, whereas to Mr. Dobrish this was a conversation of the kind that he engaged in all the time and might very well have been utterly unable to recall. To her it was a very important conversation to recall. He does not obviously deny he could have had it.

Mr. Goldberger calls to my attention that page 47 of the minutes of the transcript would permit the reading that at the time she said she had a conversation about the law the law was not in existence. It allows perhaps of that reading. On the other hand I am not completely sure that it does, and in any event Miss Stephenson was perhaps not expressing herself as clearly as she might have wanted to because I get the conclusion that it was an application for jury duty in this court antedating her service as a juror on this very case and therefore not way back at a time when the matter was first dismissed, so I must reject that argument.

On the basis of the foregoing I am going to

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deny the motion to reopen the hearing and the foregoing constitutes my findings of fact and conclusions of law.

I assume both sides are ready for senence.

MR. BLOCK: The Government is ready, your Honor.

MR. GOLDBERGER: We are ready, your Honor.

THE COURT: All right.

Mr. Block, do you have anything to add to my store of knowledge at this time?

MR. BLOCK: Your Honor, I read Mr. Goldberger's sentencing memorandum this morning when I got back to the office and I know it's already late. I would just like to comment briefly with respect to a position that is taken in that case, rather in that document, and that is that this case is a perjury case and it's wholly irrelevant and the Court should not consider in passing sentence on the defendant at this time the other charges that were in the same indictment against him and about which your Honor heard proof at the trial.

It is well established in this Circuit that the Court has great flexibility in considering matters at time of sentence including according to Judge Friendly's writing for the Court in United States against Doyle:

"To take into account other criminal activity of the defendant particularly activity closely related to the crime at hand."

Now we think that activity closely related to the crime at hand is precisely what the bank robbery and the bank robbery attempts about which your Honor heard evidence are in relationship to the perjury because while no man has to act rationally we can assume that when Mr. Mulligan appeared before the grand jury in September of 1975 and perjured himself there had to have been a motivation or reason to do so when you consider that the perjury was denying that he knew anyone by the name of John Serisani or that he recognized the person depicted in the photograph which was a photograph of Mr. Serisani.

Add to the so-called irrelevance of the other charges besides perjury Mr. Goldberger calls the Court's attention to the manner by which the guilty verdict was reached in this case.

I don't want to comment on that. I think there has been too much comment on that whole issue so far, but there is a suggestion in the papers that it would deprive Dennis Mulligan of his constitutional rights if the Court were to consider in any way the trial evidence about his participation in the bank robbery.

As your Honor may be aware in United States against Zweig the Court of Appeals expressly rejected that contention and the factual situation is of some parallel here so I would like to outline it.

Zweig was a perjury prosecution and Zweig was charged with 15 counts of perjury in an indictment. The case went to trial before Judge Frankel and the jury and Zweig was convicted of one one count of perjury. He was acquitted of the other 14 counts, not a mistrial or lack of verdict as occurred in this case with respect to the other charges.

Judge Frankel who I believe is cited as authority for the imposition of a probationary sentence in this case imposed a 30-month term of imprisonment and a $2000 fine and apparently speculated that he had considered the trial evidence on the other specifications of perjury.

Zweig attacked the sentence as illegal because he said Judge Frankel had done that.

When the case got up to the Second Circuit the following was said:

> "However just as the sentencing judge may rely upon information as to crimes with which the defendant has been charged but not tried," citing United States against Doyle, the case I just

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mentioned, "so here the judge could properly refer to the evidence introduced with respect to crimes of which the defendant was acquitted. Acquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant. For all that appears in the record of the present case the jury may have believed all such evidence to be true but have found some essential element of the charge was not proved."

In fact, and this is perhaps more relevant, the kind of evidence here objected to may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn since unlike hearsay the evidence involved here was given under oath and was subject to cross examination and the judge had the opportunity for personal observation of the witnesses.

Your Honor, in their sentencing memo the defense has suggested that for this Court to now impose a severe punishment on the basis of the perjury conviction would serve no legitimate goal either for the defendant or the public. That is simply wrong in the Government's view

Dennis Mulligan was at the time of his

perjurious testimony as well as at the time of the other events about which you heard testimony at the trial in a position of high public trust, a fiduciary guarding the law, and sworn to uphold, not to trample upon it as if he were above it because he carried the gold shield of a detective of the New York City Police Department.

Public respect for the even-handed administration of criminal justice, and we also suggest for the integrity and honesty of the tens of thousands of honest law-abiding members of the New York City Police Department and other law enforcement agencies in this city, would be eroded if a substantial custodial sentence were not imposed in this case.

In addition, your Honor, if you credit the testimony given at trial concerning the bank robbery this is not just a technical crime. It was a violent crime though Mulligan -- or had the potential for being a very violent crime though Mulligan perhaps himself did not go inside the bank.

I think the only point to be made is that Dennis Mulligan stands in no greater or lesser position than any other person who had engaged in the acts of which he is convicted and of which we suggest to your Honor quite clear and convincing proof of his criminal activity.

THE COURT: Mr. Goldberger.

MR. GOLDBERGER: Thank you, Judge.

THE COURT: Before you start so that I won't interrupt you, do you disagree with the holding of the Zweig case?

MR. GOLDBERGER: Yes.

THE COURT: In what particular?

MR. GOLDBERGER: I disagree with the philosophical, from a philosophical point of view jurisprudentially speaking that any man should be subjected to punishment on the basis of, in the Zweig case, a verdict returned of acquittal on the other 14 charges, that those 14 charges should be counted in any way against him.

In relation to the case we have before us, Judge, I think it's clear from the letter and from all that your Honor has seen that -- at least it's clear to me. Your Honor Honor may have a different view -- that the jury was 11 to 1 on the bank robbery charge. That was told to us by some jurors afterwards, immediately afterwards before your Honor signed a protective order that we couldn't speak to jurors.

Miss Stephenson mentions in her letter that she turned 11 other jurors around at least on the perjury count. It's clear that giving the Government even the benefit of the doubt on the two trials that 16 out of 24 jurors did not believe beyond a reasonable doubt that Dennis Mulligan and John Anthony Serisani robbed any banks or were involved in criminal activity with Shannon and Smith.

THE COURT: In short the answer then is the Zweig case has been property cited to me but you think it's bad law. Is that what it amounts to?

MR. GOLDBERGER: I haven't read the particular case, Judge, and I won't quarrel with how Mr. Block interprets the case. If it is properly cited I disagree with it under any circumstances.

THE COURT: All right.

MR. GOLDBERGER: I'm sure your Honor has carefully read the probation report that exists prepared by the United States Probation Office regarding Dennis Mulligan, and I'm sure your Honor has carefully read what I understand is a vast amount of letters that were sent to the Court by friends, et cetera of the defendant in this case.

THE COURT: I have.

MR. GOLDBERGER: Interestingly enough, your Honor, we quoted in our sentencing memorandum, which I know your Honor has read, a sentencing study done by the United States Attornet's Office in this District in 1972 which indicated that 50 percent of those people who were convicted of perjury were given non-custodial sentences and of the other 50 percent that were incarcerated the average length of time that they were incarcerated for was 5.2 month.

It would leave one to believe that even though I think the Court charged the jury that perjury, and I think most lawyers will agree that perjury is a serious crime, it's evidently not been regarded in terms of giving substantial jail sentences at least as a serious crime in regard let's say to narcotics crimes or crimes of violence.

You have before you, your Honor, a 40-year old man who spent 18 years in the New York City Police Department, who is the father of five children, who has lost I would say, Judge, a great deal already whatever the outcome, the final outcome of this case may be. He has lost his job. He has lost his pension, 18 years worth of pension. He has gone through two back operations. He's lost some vertebrae in his back. He's in the process now of just having obtained a commitment by the Metropolitan Petroleum Company to hire him in a refinery for a certain type of a job.

He's back living with his family in New Jersey with the five children. Right now the family is partially on welfare in New Jersey. There's a lack of support other than Dennis Mulligan. I think the probation report should confirm to your Honor that as it did to me that he spends a great deal of time with his family. He's always been a good father to his children. He's supportive of the family. During this period of time that the family has had certain financial problems his son and daughter,the oldest son, Dennis, and his daughter, Jean, have been working during the summer part-time to help the family. The son is now going to school, Bergen Community College, and will not be able -- well, if he's going to pay he's paying for his own college education. If he is going to pay for his own college education he can't use any of the money for the support the family.

So you have what amounts to a fairly tragic situation in terms of this individual and his family. You have five children who were to some extent now without support and dependent to some extent now on welfare. You have a man, your Honor, that finished two years of college himself at Empire State College receiving a degree as an English major. He was honorably discharged after serving in the Navy, and who from all of the people that I know in the Police Department, and I must say, Judge, after 11 or 12 years on both sides in the criminal law practice

I know a lot of people on both sides, say what you want about Dennis Mulligan, Dennis Mulligan has been in the past a hero police officer, a man who actively sought to protect the public.

Dennis Mulligan is not going to show any remorse in this courtroom for the crime that he has been convicted of by a jury because he is not guilty of that crime. He is not guilty of perjuring himself before that grand jury in regard to knowing John Anthony Serisani because he didn't know John Anthony Serisani. He did not commit any bank robberies with Martin Shannon or Frank Smith because he didn't know Martin Shannon or Frank Smith.

His truthful grand jury testimony was that he knew the person who had been dating his cousin, Joe Gurney, and because of that knowledge of Joe Gurney he got himself involved in this situation.

Your Honor may of course see that in a completely different light. Your Honor may and probably did form certain opinions of his own in regard to the defendant's guilt.

Now, Judge, there has been an American Bar Association study that I'm aware of.

3 There has been a study in the State of Florida that I'm very much aware of which indicates that when you're

talking about a first offender if at all humanly possible any Court, whether it's the United States District Court or a State Court, should first look to the possibility of keeping that person within society not incarcerating the defendant if it's at all possible, taking into account all of the factors including the factor of deterrence.

Can the person make a positive readjustment to society without having to be incarcerated? Dennis Mulligan is fully capable of going out and getting another job, which he has just done with this company that I mentioned to the Court. He is fully capable now of wanting to support his family, to live with his family and his children.

I assume that the purpose of any incarceration of Dennis Mulligan would be as I assume a deterrent to other people not to commit the crime of perjury. I would think that the public is very much aware of the fact that people should not commit perjury and should not commit crimes at all or else bad things can happen to them, so I think we should focus in on the individual himself.

Judge, from a personal point of view, from one lawyer to another lawyer which I think I'm allowed to express, at least at the time of sentence, I really don't see, I really don't see what there is to gain by incarcerating the defendant Mulligan at all in this case. If you place the defendant on probation for a five-year period of time certainly he has to repor to Probation. Your Honor has the possibility of a jail sentence over him should he in any way violate any of the laws of our society, the laws of the District Court or in any way violate the conditions of the tenets of his probation. So I would suggest to the Court under all circumstances that would be the most advantageous sentence, your Honor.

Place the defendant in jail away from his home where he can't help support his family, where you may be endangering the children in regard to further educating themselves and being brought up properly, I don't understand how that's going to make any sense at all. I know whenever I make that sort of a statement, and I don't make that statement lightly, I know that the first thing that must come into the Court's mind, "Well, how are we going to deter other people from doing what Mulligan has been convicted of here?" But I think sometimes the individual, his family outweighs the deterrent factor and I think when all the factors are balanced and weighed here carefully I think that a non-custodial sentence is called for in this case, Judge.

I think Mr. Block would have the Court sentence

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the defendant for bank robbery. I think if the Government wants to have this Court sentence the defendant Mulligan for bank robbery they ought to try him again for the third time on bank robbery before they ask you to do that. They have tried him twice and they're getting further away from convicting either of the defendants for bank robbery than they were before. I don't think that they should have your Honor do their dirty work with regard to bank robbery by sentencing the defendant Mulligan on the perjury as a bank robbery.

We know certainly that this wasn't a case where the jury was unanimous on the perjury count from the beginning and then just couldn't reach agreement on the bank robbery counts. I don't think the evidence is as clear as all that, Judge. Maybe in Mr. Block's mind it is but it isn't in my mind, it never was and I tried the case twice.

I would ask your Honor -- I know we have had some problems, your Honor and I have had some problems. I only ask your Honor to put those out of your mind when you --

THE COURT: You know, Mr. Goldberger, you keep harping back on this. I haven't thought about that since weeks ago.

MR. GOLDBERGER: Well, good, Judge. Then I don't mean to harp on it but you know it weighs on a lawyer's mind that perhaps he may have done something which would cause the judge to sentence his client to a different type of sentence than the judge might normally have sentenced him to, and I worry about that, Judge. Quite frankly I worry quite a lot about that.

THE COURT: All right, already, enough. Let's forget about it.

MR. GOLDBERGER: Under all of the circumstances, Judge, knowing the good 18 years, even assuming that your Honor feels that there is guilt beyond a reasonable doubt with regard to the perjury case, there were 18 good years, 18 years that were put in in some very tough precincts, Judge, where he did a very tough job for Nes York City.

I think that your Honor can feel safe to leave the defendant Mulligan in the street supporting his family. He'll be under the guidelines of the Probation Department and I think it would be the proper sentence under all of the circumstances here.

Thank you.

THE COURT: Mr. Mulligan, do you have anything you would like to personally say at this time?

THE DEFENDANT: No, sir, your Honor.

THE COURT: Because you can if you would like.

THE DEFENDANT: Yes, sir.

THE COURT: You give me a terrible problem, because while the jury by a split verdict disagreed on the bank robbery it seemed to me that the verdict was inescapable on the perjury because we had Telephone Company records from Mr. Serisani's house to your house. Obviously those Telephone Company records were right at the core of this thing and they don't lie. They can't be washed away. There they sit.

Somebody from Mr. Serisano's house called somebody in your house in New Jersey prior to the time when things had really begun to fly around in New York as I recall. Given that as against the entire background of the testimony it would seem to me that verdict frankly was inescapable. I do endeavor and I am endeavoring in the sentence that I feel impelled to impose here to keep from my mind the fact that there were bank robbery charges which there was testimony about but one cannot escape that; that in connection with this perjury obviously you were endeavoring to avoid something. Whether you were endeavoring to avoid revealing the family relationship between a cousin, it I recall correctly, and Joe Gurney or some association between yourself and Serisani which might then lead to other things which might then lead to other things which might lead to other things I'm not prepared to say.

The jury having found perjury beyond a reasonable doubt unanimously they concluded that you were wilfully hiding an association which could have led to conceivably bank robbery. I don't feel that I should or have to take my thinking that far. The question is what were you hiding? That raises interesting speculations that I don't have to get into.

I feel badly about what Mr. Goldberger tells me about your family. These tragedies are oftentimes unavoidable peripheral occurrences which could have been avoided if one hadn't gotten into the problem in the first place. I think the appeal to the Court's emotion based on that is a little watered down by my awareness of the fact that your apparent return to your family has been since the verdict of guilty because as I remember Michell testified that you were not living at home at the time of the trial, if I'm not mistaken, and hadn't been living home for some number of years, although you were apparently a very good family man with your children.

I'm sorry for the effects that this may have in such a circle, but I do feel strongly that you do have an especial duty to be truthful. How many times do lawyers go into court representing people and the bridgeman calls the case and there's a typed affidavit, and the judge says, "You swear to the truth of the affidavit, Officer?"

"Yes, sir."

That is responsibility that is heavy upon persons who have occupied your job to be truthful all the time and to have a special duty to be truthful when called upon to give it. It is that factor among others that impells me, I feel constrained to sentence you on what was Count 3 of Indictment Criminal 76-988 as redacted and sent to the jury, on Count 3 to a term of two years. I do not impose a fine.

MR GOLDBERGER: Your Honor, would you hear an application for bail pending appeal, please?

THE COURT: I will.

MR. GOLDBERGER: Judge, firstly let me indicate to the Court I know your Honor took into consideration the fact the defendant Mulligan is now living back with his family. He has no more income from the Police Department. There is a total lack of funds in the family now and that is the reason that he is back with his family. He has a job that he is supposed to start, your Honor, with the

Metropolitan Petroleum Company working in a refinery in Bayonne, New Jersey. There is $25,000 bail presently up with the Court. If your Honor remembers you increased the bail --

THE COURT: Let me find out what Mr. Block's feeling is about this.

MR. BLOCK: I definitely oppose it. In fact I was going to move to remand the defendant.

THE COURT: All right. Then you better argue it.

MR. GOLDBERGER: If your Honor recalls you increased the bail from $15,000 secured by certain property to $25,000 secured by certain property. There are two pieces of property up, your Honor, including the house in which Mr. Mulligan and his five children and his wife presently live in. There is also a house that's put up by his brother which is secured also by his brother's signature. His brother is a New York City fireman.

Mr. Mulligan for 18 years was as your Honor knows a member of the New York City Police Department.

Judge, I brought with me to court and I tried to speak to Mr. Block to some extent about this before, Mr. Mulligan's passport which actually expires on September the 13th, 1977. We are ready and willing of course to

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turn this over to the United States Attorney's office and of course there has been no application made for any other passport by the defendant Mulligan.

In addition to which, Judge, if your Honor sees fit I would think that the $25,000 bail, the two houses that are up, if your Honor sees fit the defendant Mulligan according to a work schedule that is worked out with his new employer will be willing to sign in to the Court House here at whatever times the Court felt it necessary.

Judge, quite frankly I may be wrong and I often am but I think the defendant has to some extent a meritorious appeal on the issue that is involved here, the conviction. I think there is a plan to expeditiously prosecute that appeal. The defendant has nowhere else in the world to go. His whole life is wrapped up in his five children; it always has been, and the children they know in the community in Emerson, New Jersey.

I would think that the Court is well aware of the fact that many people in this District who have been convicted of various crimes, and I'm sure your Honor has done that, have been out on bail pending appeal where the appeal is not a totally frivolous appeal and where there is a lack of risk of flight. I think once Mr. Block said to me, "Well we don't have an extradition treaty with

Ireland, and about five years ago some man named Peter Daly who was a policeman ran to Ireland and we couldn't get him back."

Judge, we have the passport here and we will turn it over to the Government.

Mr. Mulligan has no funds to run away with. He has no intentions of running away. His whole life is with his family. He has no money, Judge, in terms of prosecuting an appeal. We'll probably be asking for pauper's minutes on the record.

I volunteered at this point, Judge, to prosecute this appeal for no pay. I just want the Court to --

THE COURT: I just want to stop you because I want to hear from Mr. Block as to why there should be a remand. That doesn't mean that I won't hear you further.

MR. BLOCK: Your Honro, Mr. Goldberger under the statute has the affirmative of establishing that there is neither a risk of flight, there is no danger to anyone in the community or to the community itself and that the appeal is not insubstantial or that it's not being taken for purposes of delay. Whatever differences Mr. Goldberger and I may have had during the course of the trial are really irrelevant. It was a hard fought case on both sides. There is some aspect of this case as it appears to the Government that is taken on larger than life proportions.

I returned from vacation to come back to court for a scheduled commitment and I see a Xerox copy of a larger than life -- I'd like to characterize it -- article in the New York Post about the injustice that is being worked on Dennis Mulligan in the forces of the United States Government and zealous prosecutors and FBI agents seeking personal aggrandizement at his expense.

Mr. Goldberger's statement here that there is no remorse to be said by Dennis Mulligan. I have as a representative of the Government a responsibility to see that any sentence this Court has imposed the defendant will be around to serve it. My colleague reminded me that somewhere in our safe is still Mr. Daly's passport.

I suggest to your Honor that a prison sentence to any individual is not a welcome occurrence. To someone who has served for 18 years on the Police Department and obviously came in contretemps with the criminal element serving in a Federal penitentiary, no matter what special precautions may be taken, is not a welcome prospect.

Mr. Mulligan I suggest to your Honor has every incentive not to come back to court to serve that sentence

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if an appeal should be adverse to him. Further, your Honor, I sat through the same trial and I presumably read the same authorities with respect to the motion that Mr. Goldberger read and I don't think that there is a substantial issue on appeal, at least if what Mr. Goldberger was referring to was this juror issue.

THE COURT: Is that the issue you were referring to?

MR. GOLDBERGER: No, Judge, there is one more issue. One of the issues that we intended to raise if your Honor recalls we've done some preliminary research on it already was the fact that I had requested the full grand jury transcript be submitted to the jury. Your Honor denied that. Mr. Block was allowed to only read certain portions, certain questions which Mr. Mulligan had answered which were alleged to be perjurious.

Then I asked if your Honor would have the entire transcript read so that the context of the grand jury question could be brought out to the petty jury allowing the questions regarding Joe Gurney and the relationship between Gurney and the cousin and so forth and so on. We've done some research in regard to this issue.

I don't have any case citations for you now, Judge, but it appears to be a viable issue that this petty

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jury should have been at least allowed to explore in full context this defendant's grand jury testimony on the perjury counts.

Your Honor, there is also the matter that the Government is persuaded by the proof that was introduced at the trial or at the trials as Mr. Goldberger elects to characterize them that this defendant engaged in a conspiracy to commit what could have been a tragic crime. It was only a pecuniary crime. I don't think the Court can say under all the circumstances that someone who no longer has employment with the Police Department -- I don't know about this Metropolitan Petroleum Company -- this is the first I heard about it today. I didn't see it in the pre-sentence report when I read it a few weeks back -- is not a danger to the community.

When you take all those tbings together, your Honor, I think remand is appropriate and if your Honor does not feel that way certainly the bail as presently constituted is not adequate. There is no cash securing the recognizance bond. The deed to the property if Mr. Mulligan is inclined to skip out, if your Honor is concerned about that at all, I think it shows less concern for what will happen to the house and his family then anything.

In other words, what I am saying is if you dissect each factor individually perhaps it's not overwhelming. When you put them all together the Court would properly find that the elements of the statute are met and that the defendant ought to be remanded. In the alternative that a substantial cash bail, and I'm speaking in six figures, be imposed or some other security much more secure than the bail that presently stands.

MR. GOLDBERGER: May I just be heard for one brief second, Judge?

THE COURT: Sure.

MR. GOLDBERGER: First of all, Judge, your Honor imposed a sentence of two years. Your Honor knows that all things being equal Mr. Mulligan is eligible for parole after one-third of his sentence which would be eight months, so that what Mr. Block is suggesting to the Court is that Mr. Mulligan will abscond and run away from his five children and --

THE COURT: Mr. Goldberger, you don't need to argue further. I am going to grant your application for bail pending appeal and I will continue it at its present figure. You will surrender the passport, please.

Does the United States Attorney wish to have any reporting schedule from the defendant in consideration of this?

MR. BLOCK: Your Honor, I think it would be appropriate if at least initially on a daily basis or perhaps if that's too onerous twice a week, three times a week.

MR. GOLDBERGER: The only problem with the daily basis, Judge, he will call every day but the problem is he's going to get a job to support his family.

THE COURT: I think probably weekly would be sufficiently.

MR. GOLDBERGER: We will be glad to sign in weekly. I believe it's open on Saturdays and Mr. Mulligan can come down on Saturdays to sign in.

MR. BLOCK: To the Probation Department.

MR. GOLDBERGER: The Pretrial Services.

THE COURT: Fine. On a weekly basis.

(Time noted: 6.45 p.m.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-AGAINST-

DENNIS W. MULLIGAN,

DEFENDANT.

NOTICE OF MOTION

S 76 CR. 988
(R.O.)

SIR:

PLEASE TAKE NOTICE, THAT UPON THE ANNEXED AFFIDAVIT OF PAUL A. GOLDBERGER, ATTORNEY FOR THE DEFENDANT, DENNIS W. MULLIGAN, THE UNDERSIGNED WILL MOVE THIS COURT FOR AN ORDER SETTING ASIDE THE JURY VERDICT IN THE ABOVE CASE ON THE GROUND THAT ONE OF THE JURORS INTENTIONALLY CONCEALED PREJUDICIAL INFORMATION DURING THE JURY VOIR DIRE, OR IN THE ALTERNATIVE, FOR A HEARING IN THIS MATTER AND FOR SUCH OTHER AND FURTHER RELIEF AS THE COURT DEEMS JUST AND PROPER.

YOURS, ETC.,

DATED: NEW YORK, N. Y.
JULY 13, 1977

GOLDBERGER, FELDMAN & BREITBART
ATTORNEYS FOR DEFENDANT
401 BROADWAY SUITE 306
NEW YORK, N. Y. 10013

TO; HON. ROBERT B. FISKE, JR.
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ATT: IRA BLOCK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-AGAINST-

AFFIDAVIT

DENNIS W. MULLIGAN,

DEFENDANT.

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

PAUL A. GOLDBERGER, BEING DULY SWORN, DEPOSES AND SAYS:

1. I AM THE ATTORNEY FOR THE ABOVENAMED DEFENDANT AND AM FULLY FAMILIAR WITH THE FACTS AND CIRCUMSTANCES OF THIS MATTER. I MAKE THIS AFFIDAVIT BASED ON THE PRIOR PROCEEDINGS HEREIN, COMMUNICATIONS FROM THE JURORS IN THIS PROCEEDINGS TO THE COURT AND/OR THE PARTIES HEREIN, AND CONVERSATIONS I HAVE HAD WITH A PRIVATE INVESTIGATOR AND SEVERAL OTHER PERSONS WHO WERE CONTACTED BY THIS INVESTIGATOR.

2. AS YOUR HONOR KNOWS, I PREVIOUSLY MOVED FOR A HEARING BASED ON IRREGULARITIES DURING THE JURY DELIBERATIONS. IN RESPONSE TO MY APPLICATION (WHICH YOUR HONOR DENIED) A PROTECTIVE ORDER WAS ISSUED DIRECTING THAT WE HAVE NO CONTACT WITH ANY OF THE JURORS. WE HONORED THIS PROTECTIVE ORDER COMPLETELY; HOWEVER, ON MONDAY, JULY 11,1977, WE RECEIVED A COPY OF A LETTER THAT ONE OF THE JURORS HAD WRITTEN TO THE PROSECUTOR. THIS LETTER (A COPY OF WHICH I BELIEVE WAS ALSO SENT TO YOUR HONOR, AND WHICH IS SET FORTH AS EXHIBIT A OF THIS MOTION) INDICATED TO US THAT THERE WERE SERIOUS PROBLEMS WITH REGARD TO THIS JUROR'S COMPETENCY AND IMPARTIALITY. ACCORDINGLY, WE HAD A PRIVATE INVESTIGATOR CONDUCT A BACKGROUND INVESTIGATION OF THIS JUROR IN ORDER TO DETERMINE IF THERE WERE ANY FACTS WHICH WOULD SUPPORT OUR CONCERN (YOUR HONOR HAD INDICATED AT THE TIME THAT THE PROTECTIVE ORDER WAS ISSUED THAT IT DID NOT BAR THIS TYPE OF INVESTIGATION).

3. OUR INVESTIGATOR HAS DISCOVERED INFORMATION WHICH ESTAB-

LISHES THAT IN 1973 THIS JUROR STABBED AN EMPLOYEE OF THE UNITE STATES POST OFFICE IN THE HEAD INSIDE THE MAIN POST OFFICE BUILDING AT 909 THIRD AVENUE, NEW YORK, N. Y. ACCORDING TO THE COMPLAINT (ATTACHED HERETO AS EXHIBIT B) THAT ASSAULT WAS SERIOUS ENOUGH TO REQUIRE THAT THE VICTIM BE TAKEN TO A HOSPITAL FOR TREATMENT OF HIS INJURIES. THIS JUROR, MS. STEPHENSON, WAS ARRESTED, AND, APPARENTLY AFTER SPENDING THE NIGHT IN JAIL, WAS ARRAIGNED ON A CHARGE OF FELONY ASSAULT (ID.). WE HAVE FURTHER INFORMATION THAT THE CHARGES WERE DISMISSED ONLY BECAUSE THE POSTAL AUTHORITIES AND PROSECUTOR FAILED TO ADVISE THE EMPLOYEE TO BE IN COURT ON SUBSEQUENT DATES. WE HAVE VERIFIED THIS INFORMATION BY INSPECTION OF THE COURT RECORDS AND BY SPEAKING WITH THE DAUGHTER OF THE VICTIM OF THE ASSAULT.

4. WE HAVE ALSO BEEN ADVISED BY RELATIVES OF THE VICTIM OF THIS ASSAULT THAT THE VICTIM SUED MS. STEPHENSON CIVILLY FOR DAMAGES BASED ON THE ASSAULT.

5. THIS INFORMATION ESTABLISHES BEYOND DISPUTE THAT THIS JUROR PERJURED HERSELF ON MATTERS OF CRITICAL IMPORTANCE DURING THE JURY VOIR DIRE IN THIS CASE. SPECIFICALLY, WHEN THIS JUROR WAS ASKED BY YOUR HONOR DURING THE VOIR DIRE WHETHER SHE HAD ''EVER BEEN INVOLVED IN A CRIMINAL CASE,'' SHE RESPONDED WITH AN UNQUALIFIED ''NO SIR.'' (MINS. 6/7/77 AT 111). SINCE IT IS INCONCEIVABLE THAT THIS JUROR COULD HAVE FORGOTTEN ANYTHING AS SERIOUS AS HER OWN ARREST ON CHARGES OF HAVING COMMITTED A VIOLENT FELONY, THIS ANSWER WAS CLEARLY PERJURIOUS.

6. SIMILARLY, WHEN MS. STEPHENSON WAS ASKED A FEW QUESTIONS LATER WHETHER SHE HAD EVER HAD ANY ''DISPUTES WITH THE UNITED STATES'' (ID. AT 111) SHE AGAIN RESPONDED IN THE NEGATIVE. SINCE MS. STEPHENSON APPARENTLY ASSAULTED A UNITED STATES POSTAL EMPLOYEE DURING AN ARGUMENT (FIRST DISPUTE), WAS FORMALLY CHARGED WITH THAT ASSAULT (SECOND DISPUTE), AND WAS SUED CIVILLY BY HIM (THIRD DISPUTE) THIS ANSWER WAS ALSO PERJURIOUS.

7. ALTHOUGH SUCH PERJURY STANDING ALONE REQUIRES THAT THIS JURY'S VERDICT BE SET ASIDE, THE SPECIAL IMPORTANCE OF THIS PARTICULAR PERJURY IN THE CONTEXT OF THIS CASE MAKES SUCH RELIEF OBLIGATORY. AS YOUR HONOR ADVISED THE PROSPECTIVE JURORS T THE COMMENCEMENT OF THE VOIR DIRE, THIS CASE INVOLVED AN ALLEGED BANK ROBBERY BY A MEMBER OF THE NEW YORK CITY POLICE FORCE (SEE MINS. 6/7/77 AT 11). MS. STEPHENSON'S ARREST ON THE FELONY ASSAULT CHARGE WAS IN ALL LIKELIHOOD MADE BY A MEMBER OF THAT SAME POLICE FORCE AND HER BOOKING AND FINGERPRINTING WAS PERFORMED IN ONE OF THE STATIONHOUSES OF THAT SAME FORCE. CONSEQUENTLY, IT APPEARS THAT MS. STEPHENSON PERJURED HERSELF TO CONCEAL THIS MATTER SO THAT DEFENSE COUNSEL WOULD NOT USE EITHER A CHALLENGE FOR CAUSE OR A PEREMPTORY CHALLENGE TO REMOVE HER FROM THE JURY.

8. AT THE VERY LEAST, THIS PERJURY PREVENTED ESSENTIAL FURTHER INQUIRY DURING THE VOIR DIRE INQUIRY WHICH WOULD IN ALL LIKELIHOOD HAVE ELICITED THE FACT OF MS. STEPHENSON'S FIVE YEARS OF PSYCHIATRIC TREATMENT (SEE EXHIBIT ''A'' ATTACHED HERETO) AND ESTABLISHED SUFFICIENT BIAS TO REQUIRE HER EXCLUSION FROM THE JURY. MOREOVER, PARTICULARLY GIVEN THIS WOMAN'S POLONGED PERIOD OF PSYCHIATRIC PROBLEMS AND TREATMENT AMPLY DEMONSTRATED BY HER ACTIONS, HER PRIOR CRIMINAL CHARGES, AND THE CONTENTS OF HER LETTER, HER PERJURY MAY WELL HAVE BEEN MOTIVATED BY A DESIRE TO REMAIN ON THE JURY TO AVENGE HER EARLIER TREATMENT AT THE HANDS OF OTHER MEMBERS OF THE NEW YORK CITY POLICE FORCE AND/OR TO ENGRATIATE HERSELF WITH THE PROSECUTOR IN ORDER TO INDUCE HIM TO AID HER IN THE PREPARATION OF A BOOK ON BANK ROBBERIES (SEE EXH.''A'' ANNEXED HERETO).

9. IT IS RESPECTFULLY SUBMITTED THAT A TRIAL AND CONVICTION

BASED ON SUCH PERJURY AND INCOMPETENCE IS CONTRARY TO THE INTERESTS OF JUSTICE, AND VIOLATES THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A TRIAL BY JURY, A FAIR TRIAL AND DUE PROCESS.

WHEREFORE, THE JURY'S VERDICT SHOULD BE SET ASIDE, OR IN THE ALTERNATIVE, THIS COURT SHOULD CONDUCT A HEARING ON THIS MATTER.

PAUL A. GOLDBERGER

SWORN TO BEFORE ME THIS
13TH DAY OF JULY, 1977.

NOTARY PUBLIC

5 July 1977

[illegible]

Hon. Ira Block, Esq.
Asst. U.S. Prosecuting Attorney
U.S. Attorney's Office
1 St. Andrew's Plaza
New York, N.Y. 10007

Dear Ira Block:

Thoreau said, "If a man does not keep pace with his companions perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away."

Thoreau was right. I'm so glad I listened to my different drummer and did not let the discordant sounds of others sway my step. It's been two weeks now, but the sounds of my drummer grow louder and clearer each day. And my pride grows stronger with each beat!

It is difficult to formulate what I wish to say to you, tho' I am normally more facile at the written word than the spoken. I owe you a great debt of gratitude, Ira Block. A debt to be shared in part with Ageny Walker, Mike Roche, Judge Owen, even my fellow jurors, and yes, "my character," Frank Smith. But it is you who stand out in greatness.

What happened to me as a juror was totally unexpected -- from the first gasp of surprise at being chosen, the exhileration of the trial itself, the agony of deliberation, my tremulous talk with Agent Walker immediately following the trial, to the final moments in your office. I wish I could have spoken to you more extensively at that time. But the circumstances were not unlike being in the "inner office" of a candidate, whom you've worked for and beleived in, at the moment of victory. There is little time to say much to those immediately surroun ing the candidate -- but the thrill of just being there defied description. Thank you for letting me share in your "victory." I just hope you meant it when you said you were happy with our one count of purjury.

I, of course, wish your victory had been complete. I wish we could have convicted on all counts. But Ira (I hope you don't mind my calling you Ira. I do feel rather close to you after all this), your victory was much greater than the conviction of two criminals. You restored conviction (or, faith, if you will) to a fellow human being. That is greatness. You succeeded in doing something that five years of anaylsis with a brilliant doctor could not do.

As I told you, the weekend before our final deliberations on Monday, I literally descended into hell. I dredged up five years of analysis and then some. I went through a complete catharsis of the soul. It was not pleasant. And I had to do it alone. But I came out a different person -- or more accurately, the person I once was.

I regained my self-confidence. In beleived, for the first time in

"Exhibit A"

- more -

years, in myself (my talent, my ability, my system of values). I beleived with all my heart that I was right, despite the fact that eleven other people said I was wrong. And, just as I regained my own self-esteem, I regained my esteem for my fellow man. I recognized that there are lots of good people out there -- and how very fortunate I'd been throughout my life to have come in contact with so many of them.

I understood, perhaps for the first time, the meaning of "an ideal." And why men and women were willing to go to any extreme for something so intangible. I never thought I could. But I know now that I could -- and I would.

You asked me in your office if all this had restored my faith in the jury system. I answered, "I don't know. Not with that jury it hasn't." Well, I was wrong. (Please understand that at that time I'd neither eaten nor slept, except fitfully, for three days and I'd just spent over an hour re-hashing the whole thing with Agent Walker.) To answer your question more accurately, yes, it has re-affirmed my faith in the jury system. I still find it far from perfect, but I can't conceive of a better system.

For instance, four jurors wanted to change their minds about our conviction on one count of purjury right after we'd sent the note to Judge Owen. The other jurors talked them out of it. Following our conversation on Monday in your office, I spoke with two of my fellow jurors on Tuesday. I didn't tell them the things I'd said or what you and Agent Walker had said. I merely wanted to re-assure them that we'd been right in our original conviction. They told me that four of them had left together -- including two of those who'd wanted to change their vote. As they left, they were approached by a U.S. Marshall (no less!!) and were told, "You're stupid! That cop's innocen That's wrong! I can live with my conscience because I'm convinced I was right. But think of those people. They are less strong than I, and will live in doubt and false guilt for the rest of their lives. (I just wish he'd approached me. I'd have told him what I thought -- including how unfit he was for his job!)

Despite all this, my faith in the judicial system per se has been greatly restored. Due mainly to men like yourself, Judge Owen and Judge Haight (whom I was called before along with 40 other prospectiv jurors, but never interviewed). These are not the political pawns I once thought. Rather they are men of wisdom, fairness and concern. That awareness alone makes it all worth while.

But the most important thing (selfishly, perhaps) to come out of all this is that I've begun to write again. I can't tell you how long it' been since I've written so much as a letter! (Maybe that's why this one's so long.)

Friday, July 1, was my birthday. And for the first time in years I felt it was a real birth-day. And it was a happy one. I was the me I started out to be. I'm writing again! Eagerly. Avidly. With enthusiasm! I am deeply involved in a project I firmly beleive in (my Frank Smith book). Thank you, Ira Block -- that's a heck of a birthday present!

- more -

Remember when I spoke to you the Friday following the trial? You said you'd speak to Smith's attorney the next week, but I said, "No, there's too much preliminary work to be done first." Actually what I was saying was that I had to be sure of me first. That this wasn't just some transitory thing. "Post-trial exhileration syndrome", if you will.

Well, I'm sure now. I've spent countless hours in the library. And I spend at least 3 to 4 hours each night (usually more) writing -- something!

You were right. I'm not going to get anything out of the newspapers that I don't already know. But the discipline has been good. And I did pick up a bunch on the bank robbing business which I need to know as background material in order to write a fictional book. I'm ready now, Ira. I convinced I can do it!

So, you to whom I am already so deeply indebted, I turn to and ask, "May I extend that debt a little further?"

I am ready now to talk with Mr. Smith. I realize this must be arrange through his lawyer. So can you put me in touch with the lawyer?

The book will be entirely fiction. Quite frankly, I have no up-front money, but I do have fantastic publishing contacts. And I am willing to split the royalties 50/50 with Mr. Smith. After all, it's his story, I'm merely writing it. Also, I have no lawyer of my own at this time. But when the time is right, when I have something solid to present to a publisher (2 or 3 chapters, say), I know where to get one. And I will let him thrash out the details (movie, TV, serial, Scandanavian and Latin American rights, etc.) with Mr. Smith's lawyer.

Next. If Smith is going to testify at upcoming trials, I'd like to know the dates of his scheduled testimony. I'm not particularly interested in the trails per se -- I just want the feel of my character.

Next. Since Smith gets out of jail in November, I must arrange all my interviews with him before that time. I still have 3 weeks vacatio coming to me -- and I'd like to spend them talking to Frank Smith. Preferably during the daytime, although, undoubtedly more interviews will be necessary, but we'll worry about that later. If possible I'd like to schedule the interviews for late July and early August. That way we'll still have a couple of months to play around with (to fill in skimmed over points, check technical material, etc.).

Next. I know that neither you nor the FBI can open your files to me. Nor can you go with me to interview Smith. That I must do alone -- and want to do it alone. But I would appreciate any leads you can give me.

Next. I know that Grand Jury testimony is not available to the general public. But trial testimoney is a matter of public record!! How do I gain access to transcripts of Smith's previous trials, or trials he has testified in? Where do I go to read them? Do I need

- more -

special credentials?

It's getting very late -- and sitting in an un-airconditioned, un-windowed office tends to make the Muse's voice a little hoarse. But Ira, we've got one hell of a book! And just think, the government's going to get its money back triple fold. First I'm going to pour my "jury money" back into the economy by buying an electric typewriter for my apartment (already have one picked out!). Next, we make enough money on the royalties and Frank Smith will never have to rob another bank. Next, we make that much money on royalties, as a single person, non-head-of-household-type tax payer the government's going to rob me! Which may make me want to go out and rob a bank -- which will pay the salary of some assistant US prosecutor, not to mention countless FBI agents. So, you see, one way or the other, it's all for the good of the country!

Am enclosing my card. Please give me a call at your earliest convenience. Or, if you're ever in the neighborhood drop in for a cup of coffe (altho' I don't drink that either, but I'll settle for a Coke) -- I'd still like very much to talk with you.

Hope your Fourth of July was as happy and meaningful as mine.

Again, Ira Block, I thank you -- for so very much.

Sincerely,

Ginger

Ginger Stephenson
220 E. 54th St., #5-B
New York, N.Y. 10022

Criminal Court of the City of New York

Part ...., County of ............N.Y..........

STATE OF NEW YORK, } ss.:
COUNTY OF ..............N.Y...............}

FELONY COMPLAINT

P.O. Robert J. Moeser #27493

of 17 PCT, County of N.Y., State of N.Y.

being duly sworn, deposes and says that on Nov 15, 1973, at about 9.25 p.m.

at 909 Third Avenue inside the Main Post Office

in the County of N.Y., City and State of New York,

the defendants Ginger Stephenson

committed the offenses of P.L. 120.05 Assault

under the following circumstances:

Deponent states that he is informed by UF9719 that the defendant did with an unknown object strike one Joseph Scelza, 58-24 63 Street, Queens, NY on the head thereby causing Joseph Ecelza physical injury which required treatment at a hospital.

N364385

Deponent

Sworn to before me

Nov 16, 19 73

[illegible] Judge.

EXHIBIT "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

DENNIS W. MULLIGAN,

Defendant.

S 76 Cr 988
(RO)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SET ASIDE VERDICT

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Defendants
Office & P.O. Address
401 Broadway
New York, New York 10013

As the Supreme Court of the United States held in Frazier v. United States, 335 U.S. 497, 505 (1948):

> "[T]he right [to peremptory challenges] is given in aid of the party's interest to secure a fair and impartial jury..."

Accordingly, concealment of an act which would either demonstrate or indicate actual bias or, at the least, would give defense counsel reason to exercise such a challenge, is a deprivation of the Sixth Amendment right to an impartial jury as well as a violation of due process of law. United States v. Vento, 533 F.2d 838, 870 (3rd Cir., 1976); see, also Fed. R. Crim. Proc 24(b).

In the brief time permitted for research, four cases have been found in which the concealment of information on the voir dire led the courts to either grant a new trial or, where the defendant had been acquitted, hold the juror in contempt. Clark v. United States, 289 U.S.1 (1933); Jackson v. United States, 395 F.2d 615 (D.C. Cir. 1968); United States ex Rel De Vito v. McCorkle, 248 F.2d 1 (3rd Cir. 1957), cert. denied 78 St. Ct. 121; United States v. Lampkin, 66 F. Supp 821 (S.D. Fla. 1946); cf. Mikus v. United States, 433 F.2d 719 (2d Cir. 1970) (where the refusal of the lower court to dismiss jurors for cause because of revealed information was upheld because counsel was able to use peremptory challenges to remove them.)

The Jackson and DeVito cases are particularly apposite because the appellate courts focused on the fact that the concealed information was precisely what trial counsel had been seeking during the voir dire. Here, defense counsel were particularly concerned about anyone with prior exposure to the criminal law because of the fear that any resentment toward law enforcement would be used against defendant, who was a New York City detective; both questions suggested by defense counsel and colloquies conducted by the court show that this area was concentrated upon during the voir dire (Mins. 6/7/77 at 11, 12, 14, 17, 18, 19, 20, 21, 25, 26, 33, 35, 38, 39, 41, 44 [Court dismissed juror who indicated that three members of her family were in law enforcement and this might affect her ability to sit as an impartial juror), 54, 56, 57, 58-59 [juror indicated that he had been a victim of a mugging; Mr. Block concerned that he would have strong positive feelings about detectives; we are dealing with the reverse situation] 61, 63, 66, 67, 70, 73, 74, 75, 77, 78, 81, 84, 87, 90, 94, 95, 97, 99, 100, 101, 103, 111-113, 114, 117, 121, 124, 125, 126, 128.

This concealment not only deprived defense counsel of his right to intelligently exercise peremptory challenges under Rule 24(b), it was also a fraud upon the Court and prevented the Court from discharging its duty under Rule 24(c) to "replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.'' See, e.g., United States v. Floyd, 496 F.2d 982, 990 (2d Cir., 1974) (discharge by court of juror who revealed information rendering him partial to defendant held proper). It is clear that the Court took its obligation under Rule 24(c) quite seriously as it excused several potential jurors on its own. See, e.g., Mins. 6/7/77 at 44, 93, 98-101.

There can be no possible claim that this concealment was inadvertent, e.g., that since the charge against her was dismissed, she could somehow see herself as never having been "involved" in a criminal case. See, e.g., United States v. Robbins, 500 F.2d 650 (5th Cir.,1974). A prior juror (Mr. Seaman) had revealed only eight pages earlier that he had been before a magistrate twice but that no conviction had resulted (Mins. 6/7/77 at 103). Since he gave this answer in response to the same question she had been asked, she could not have believed that only convictions were being called for.

(continued on next page)

Assuming, without conceding, that this concealment does not entitle defendant to a new trial as a matter of law, at the very least it entitles him to a hearing. In every single case of concealment, a hearing has been held as a matter of course to enable the court and counsel to fully explore the circumstances of the concealment. See eg. United States v. Robbins, supra; United States v. Floyd, supra; United States v. Jackson, supra.* As a matter of fact, in United States v. Clark, supra, the Supreme Court held that the jury's deliberations could be explored at such a hearing because the concealment during the voir dire operated as a fraud; at the very least, what Ms. Stephenson did during the deliberations should be explored, particularly in view of the evidence now before the Court indicating both her perjury and the fact that she was the only hold-out for conviction during most of the deliberations.**

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*The absence of a hearing in United States v. Vento, supra, is explainable by the fact that the juror who concealed information did not participate in the deliberations. 533 F2d at 870. Here, it is our contention that Ms. Stephenson was the only obstacle to acquittal.

**Other matters which might be explored at a hearing are the existence of any further criminal record for Ms. Stephenson, any psychiatric background, any further perjury during the voir dire, etc.

CONCLUSION

FOR THE ABOVE STATED REASONS
THERE SHOULD BE A NEW TRIAL.

Respectfully submitted,

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

UNITED STATES OF AMERICA, :

- v - :

DENNIS W. MULLIGAN, :

Defendant. :

- -x

AFFIDAVIT IN
OPPOSITION TO
MOTION TO
SET ASIDE VERDICT

S 76 Cr. 988 (RO)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

IRA H. BLOCK, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and as the Assistant United States Attorney who represented the Government at the trial herein, am fully familiar with the background facts and circumstances of this prosecution. This affidavit is submitted in opposition to defendant Mulligan's motion to set aside the jury verdict in this case and for a new trial.

2. The information contained in this affidavit has come to my attention in the course of an investigation conducted by the United States Attorney's office in conjunction with the Chief of Detectives' Field Internal Affairs Unit of the New York City Police Department and the Federal Bureau of Investigation. The purpose of this investigation was to ascertain the facts regarding the 1973 arrest of juror Stephenson stated to be the predicate of defendant's new trial motion, and to collect whatever documentary materials possible fully to reflect the incident or incidents

alleged and the context of their relationship, if any, to the voir dire examination of prospective jurors in this case held on June 7, 1977.

3. In the course of this investigation, files and records of the New York City Police Department, the New York City Criminal Court -- New York County, the Civil Court of the City of New York -- Queens County, the Federal Bureau of Investigation and the United States Postal Service were examined.

4. From the records of the 17th Precinct of the Police Department, copies of the complaint and arrest reports were obtained and are annexed hereto as Exhibits A and B, respectively. The complaint report reflects that at approximately 9:35 P.M. on November 15, 1973, one Joseph Scelza, a watchman at the Post Office at 909 Third Avenue in Manhattan, complained to a uniformed Patrolman assigned to the 17th Precinct that ten minutes earlier a woman, believed to be a Ms. Stephenson who lived nearby at 220 East 54th Street, had assaulted him by striking him in the back of the head with an unknown object. Shortly after taking this complaint the Patrolman apparently went to the address furnished for the assailant and searched for her there without success. The complaint was then referred by the Patrolman to Police Officer Moeser of the 17th Precinct Anti-Crime Squad for further investigation. About three hours later, according to the arrest report, Officer Moeser arrested Ms. Stephenson on the street in front of her apartment building on a charge of Assault second degree. After

her arrest, Ms. Stephenson was searched and apparently spent the night at the Midtown South Precinct where, I am informed, the Police Department has facilities for the housing of female prisoners.

5. Later that day, Ms. Stephenson was arraigned in Part AR-1 of the New York City Criminal Court before Hon. Harold Rothwax, a Judge of that Court. The Stenographer's Minutes of that proceeding, together with true copies of the felony complaint executed by Officer Moeser, the complaint back, notice of appearance of counsel and New York State Division of Criminal Justice Services fingerprint record were obtained from the Official Court Reporter and Clerk of the Court and are annexed hereto as Exhibits C through G, respectively. A reading of the minutes of arraignment (Exhibit C), in conjunction with examination of the complaint back (Exhibit E) discloses that Ms. Stephenson was represented by privately retained counsel (Robert Z. Dobrish, Esq.) at that proceeding; that the complainant, Mr. Scelza, was not present; and that Judge Rothwax took the unusual step of marking the case "final against the People" for the adjourned date of November 27, 1973 in Part AP-1 of the Court. Pending the adjourned date, Ms. Stephenson was released on her own recognizance. It should also be noted here that counsel sought to interpose a cross-complaint against Mr. Scelza on Ms. Stephenson's behalf at this proceeding and that Judge Rothwax, referring this aspect of the matter to the Judge presiding in Part AP-1 on the adjourned date, nevertheless directed that Mr. Scelza be notified to appear on the adjourned date.

6. Also obtained in the course of our investigation were copies of the Stenographer's Minutes of the proceedings on the adjourned date, November 27, 1973, in Part AP-1 before Judge Shirley Levittan, and of a court sheet titled "Record of Court Action." (True copies of these items are annexed hereto as Exhibits H and I, respectively). These materials show that when the case was called on the adjourned date, the Assistant District Attorney immediately moved to reduce the charge from second degree assault, a Class D felony, to simple assault, a misdemeanor. Thereafter when Mr. Scelza failed to appear as required, the Assistant District Attorney sought to adjourn the case in contemplation of dismissal but Judge Levittan ordered an immediate outright dismissal consistent with Judge Rothwax' order of peremptory adjournment at arraignment. This dismissal was nominally made upon motion of the Assistant District Attorney.

7. During the aforementioned investigation copies of documents on file with the Identification Section of the New York City Police Department were also obtained. Annexed hereto as Exhibits J through N, respectively, are true copies of a correspondence log relating to a request by Ms. Stephenson pursuant to Section 79-e of the New York Civil Rights Law for the return of fingerprints and photographs taken at the time of her arrest, a transcript of record from the Criminal Court attesting to the dismissal of the charge against Ms. Stephenson, two memoranda from the Identification Section, addressed to the Court Division of the Police Department and the Commanding Officer of the 17th Precinct, relating to the request, and a "Prisoner's Criminal

Record" for Ms. Stephenson, commonly referred to as a "yellow sheet". According to conversations I have had with Ms. Frances R. Tiano, a Senior Clerk with the New York City Police Department, who has been assigned to the Identification Section for 16 years and supervises the unit within that Section responsible for handling Civil Rights Law § 79-e matters, read together these documents establish that on or about January 21, 1974 a written request was received by the Police Department from Ms. Stephenson requesting, pursuant to Civil Rights Law § 79-e, return of photographs and fingerprints taken when she was arrested on November 16, 1973. This request was accompanied by the required certificate of dismissal of charges from the Criminal Court. (Exhibit K). Following established procedures, upon receipt Ms. Stephenson's request was assigned a control number by the Correspondence Unit of the Identification Section, and form memoranda were dispatched to the Court Division (Exhibit L) and the precinct of arrest (Exhibit M) notifying them of Ms. Stephenson's demand and directing these commands to search the files for which they were responsible and to remove therefrom any arrest photographs which they might find.

8. According to entries on the memorandum forwarded to the Court Division, on January 30, 1974 Police Officer Makely searched the files of the New York County Branch of the Criminal Court and removed two Polaroid photographs of Ms. Stephenson contained in the Court file. This occurrence is corroborated by a rubber stamp entry appearing on the Warrant Investigation Report obtained from the Criminal Court (a true copy of which is annexed hereto as Exhibit

O) stating, "POLAROID PHOTOGRAPH REMOVED per sec. 79E, N.Y.S. CIVIL RIGHTS LAW," bearing Officer Makely's name and dated "1-30-74". An entry on the correspondence log (Exhibit J) indicates that these photographs were received back at the Identification Division in early March, 1974. Similarly, the memorandum addressed to the 17th Precinct was returned with the notation, "NO PHOTOS".

9. In the ordinary course of the procedures established by the Identification Section to process requests under § 79-e, according to Ms. Tiano, after the photographs are assembled, fingerprint cards from the arrest are also collected (see entry dated February 5, 1974 on correspondence log [Exhibit J] indicating "N.Y.C. PRINT IN FOLDER") and the requesting party is then notified that processing of the request has been completed and that the arrest photos and fingerprints may be picked up at Police Headquarters. This procedure was followed in connection with Ms. Stephenson's request and is reflected by the notation on her "yellow sheet" (Exhibit N) that her fingerprints were returned under Civil Rights Law § 79-e.

10. I have also been informed by Special Agent William J. Augustitis of the FBI that the records of the FBI Identification Division, based on supplying the full name and date of birth for Ms. Stephenson, reflect that she was arrested by the New York City Police Department on November 16, 1973 and that her fingerprints were subsequently directed to be withdrawn from the FBI files and returned to the contributing agency.

11. During the investigation a request was made to the United States Postal Inspection Service in New York to examine their investigative file regarding the alleged assault upon Postal Employee Scelza. In response to this request, Seymour Herold, Assistant Postal Inspector-in-Charge, informed me that there was no complaint on file with that Service concerning the assault allegedly occurring at the F.D.R. Postal Station at 909 Third Avenue on November 15, 1973, and that consequently no investigation regarding possible violation of 18 U.S.C. § 1114 resulting from injuries claimed to have been sustained by Postal Employee Scelza was conducted. Inspector Herold further explained that it was long-standing Postal Service policy for all work-related injuries sustained by postal employees at the hands of another individual to be referred to the Postal Inspection Service for investigation as possible violations of the Federal assault statute cited previously.

12. Thereafter, an examination of Postal Employee Scelza's personnel file was requested of the Postmaster. In response, four memoranda prepared by Mr. Scelza relating to the incident of November 15, 1973 were furnished, copies of which are annexed hereto as Exhibits P through S. The earliest memorandum, dated December 21, 1973 (Exhibit P), reflects that soon after November 15th Mr. Scalza determined to retain a lawyer to prosecute a civil claim against Ms. Stephenson. Subsequent memoranda, dated April 12, 1974 (Exhibit Q), June 27, 1975 (Exhibit R) and March 5, 1976 (Exhibit S), reveal that this claim was pending for more than two years until resolved.

13. Records of the Queens County Branch of the New York City Civil Court were also consulted concerning a civil suit instituted there by Mr. Scelza against Ms. Stephenson. Annexed hereto as the respectively designated Exhibits are true copies of the following documents concerning that litigation: Small Claims docket card (Exhibit T); Civil Court docket card (Exhibit U); memorandum of decision dated January 15, 1976 (Exhibit V); and typewritten decision dated January 16, 1976 (Exhibit W). Read together, these documents disclose that Mr. Scelza filed a Small Claims action against Ms. Stephenson on October 30, 1974 demanding the sum of $500 as a result of the claimed assault. Thereafter, Ms. Stephenson was granted leave to file a formal answer and counterclaim against Scelza for assault and false arrest, demanding judgment for $10,000. With issue thus joined, the matter was transferred from the Small Claims Part to a regular Trial Part of the Civil Court, and plaintiff Scelza upon motion was permitted to amend the *ad damnum* clause of his complaint from $500 to $10,000, the statutory limit of the monetary jurisdiction of the New York City Civil Court. *See* New York City Civil Court Act § 202. On January 15, 1976, a non-jury trial was held before Judge Thomas V. LaFauci. Both litigants testified in their respective behalves. Resolving the conflict in testimony against Ms. Stephenson, plaintiff Scelza was awarded judgment by the Court in the amount of $650 on his cause of action. With respect to Ms. Stephenson's counterclaim for false arrest, Judge LaFauci dismissed this for want of any

proof either that Scelza had initiated the arrest of Ms. Stephenson or the subsequent Criminal Court proceeding, or that the proceeding was terminated in her favor. The Court ruled adversely on the merits of Ms. Stephenson's counterclaim for assault.

14. In a conversation with now Sergeant Robert J. Moeser, who as a Police Officer in 1973 arrested Ms. Stephenson, he informed me that he was never the recipient of any complaint, administrative or judicial, from Ms. Stephenson claiming that he had falsely arrested her.

15. It is respectfully submitted that the foregoing adequately demonstrates the totally baseless nature of defendant's claim that juror Stephenson intentionally and perjuriously concealed prejudicial information during the voir dire and that, accordingly, the motion to set aside the verdict and for a new trial should be in all respects denied.

Ira H. Block

IRA H. BLOCK
Assistant United States Attorney

Sworn to before me this
11th day of August, 1977

NOTARY PUBLIC

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979

LISTING OF EXHIBITS

Exhibit Designation	Description of Exhibit
A	Complaint Report
B	Arrest Report
C	Court Reporter's Minutes 11/16/73 Arraignment
D	Felony Complaint
E	Complaint Back
F	Notice of Appearance
G	NYSIS Fingerprint Record
H	Court Reporter's Minutes 11/27/73 Adjourned Proceedings
I	Record of Court Action
J	Identification Section Correspondence Log
K	Transcript of Record
L	Memorandum to Court Division
M	Memorandum to 17th Precinct
N	NYCPD Prisoner's Criminal Record
O	Warrant Investigation Report
P	Scelza Memorandum dated 12/21/73
Q	Scelza Memorandum dated 4/12/74
R	Scelza Memorandum dated 6/27/75
S	Scelza Memorandum dated 3/5/76
T	Small Claims Docket Card
U	Civil Court Docket Card
V	Memorandum of Decision dated 1/15/76
W	Typewritten Decision dated 1/16/76

COMPLAINT REPORT *FOR OFFICE USE ONLY (Do Not Fold This Report)

PD 313-152 (Rev. 10-71)
FORMERLY U.F. 61)

Additional Copies Required For:

Complaint File No. 3 252

Complainant's Surname: SCELZA
First Name: Joseph
Business Phone: 573-6064
Complainant's Address: 58-24 63 ST Queens N.Y.
Residence Phone:
Apt. No. PH

6. Date and Time Reported: 11/15/73 2135
11. Day, Date and Time of Occurrence: THURS 11/15/73 2125

14 *	15 *	19. Pct.	22. Compl. No.
		17	9717
	17 *	27. Post	30. C.C.D. No.
		21	708889

36 *	39 *	40 *	41 *	42. Arrest	45. Arrest Nos.

Offense (if any): ASSAULT
Place of Occurrence: ☒ Inside ☐ Outside
U.S. Post Office
909 3 Ave Grd Floor
Type of Premises, Business, etc.: Post Office
Alarm No.:
Pct.:
Date and Time Transmitted:
64. *
Referred to: To Mosner 17 Pct Anti Crime
Closed by Uniform Force: ☐ Yes ☒ No
Desk Officer's Rank/Signature:

50. Type of Property ☐ Lost ☐ Stolen	51. Value of Property	57. Value of Property Recovered
1. Autos Stolen or Recovered		
2. ☐ Autos Recovered by Other Auth. 3. ☐ For Other Auth.		
4. Currency		
5. Jewelry		
6. Furs		
7. Clothing		
8. Firearms		
9. Miscellaneous		

Witness's Surname	First Name	Address and Apt. No.	Residence Phone	Business Phone
1. Downey	Clarence	909 3 Ave Security Officer		573-6064
2. Clarence Downey				573-6064

Victim will view photos ☐ Yes ☐ No

PERPETRATOR'S DESCRIPTION

	Sex	Color	Age	Hgt.	Wgt.	Hair	Eyes	Complexion	Other (Scars, Tattoo, Clothes, etc.)
1.									
2.									
3.									

PERSONS ARRESTED:	Surname	First Name	Address and Apt. No.	City
1.				
2.				

DETAILS AS REPORTED BY COMPLAINANT AND/OR INITIAL INVESTIGATING OFFICER Compl. a Security Officer
For The U.S. Post office while working at time/place of occur.
was struck in back of head by unknown object. Compl. removed to Bell
Hosp. Attn. Shore. Compl. and witness state that a female known to them
by sight who resides in Apt. House at 320 E 51 St. Apt. 6G was the one
Tentative identification of perpetrator is
who assaulted Compl. Apt. searched at this time negative results
Ms [illegible] Stephenson [illegible] at time of search w/keys. SGT Weisbrod [illegible]
super of bldg [illegible] Chapman

USE REVERSE SIDE IF MORE SPACE IS NEEDED (Carbon must be inverted)

VEHICLE USED	Make	Year	Color	License No.	State	Body Style	Other Characteristics

WEAPONS USED: ☐ Revolver ☐ Automatic ☐ Rifle
Caliber:
Knife (Describe):
Other (Specify):

EVIDENCE: ☐ None ☐ Personal Belongings ☐ Narcotics ☐ Tools ☐ Other
Specify:

DESCRIPTION OF LOST OR STOLEN PROPERTY - See Appendix G of R. & P.
Property Clerk Voucher No.

Article (Name Only)	Quantity	Value	Description (Include Serial Numbers Where Possible)

Initial Investigating Officer's Name (Typed)
Rank: P.O. Name: Martinez Shield No.: Command: 17

Investigating Officer's Signature: Martinez

Precinct Commander's Signature
Rank: Name: Command:

PRECINCT OF RECORD COPY

M703268-1,400M-11/73

EXHIBIT "A"

Sgt P. W.

~~253~~

PRISONER'S SURNAME, FIRST, INITIALS: Stephenson, Ginger A.
PCT.: 17
ARREST NO.: 7570
DUPLICATE COPIES REQUIRED FOR:

ADDRESS: 220 E. 54th St., NYC NY
APT./FLOOR: 6G
DATE OF ARREST: 11-16-73
TIME: 0030

ALIAS/NICKNAME: XXX
MOTHER'S MAIDEN NAME: Thomas
DATE OF BIRTH: 7-1-35
AGE: 38
SEX: F
COLOR: W
COMPLAINT NO.: 9719
PCT.: 17

PLACE OF BIRTH (City or Town, State or Country): Leesburg, Florida
SOCIAL SECURITY NO.: 264-46-3520
☐ MARRIED ☒ SINGLE

OCCUPATION: Adv. Mngr
WHERE EMPLOYED (Company and Address): PL 2-7050 Editor & Publisher, 850 Third
☐ NON-CITY RESIDENT
☒ RESIDES IN 17 PCT.
☒ CITIZEN ☐ ALIEN

OCCURRENCE DATE: 11-15-73
TIME: 2125
PLACE: 909 Third Ave.
☒ INSIDE ☐ OUTSIDE
POST:
SECTOR:
TYPE OF PREMISES (Business, etc.): Street

COMPLAINANT'S NAME AND ADDRESS: Scolza, Joseph, 58-24 63 St., Queens, NY
TELEPHONE NO.: 573-6064
☐ ADVISED OF CONSTITUTIONAL RIGHTS

LICENSES/PERMITS/IDENTIFICATION CARDS (Enter Type, Serial Numbers and Disposition): None
☒ FINGERPRINTED AND CHECKED FOR ACCURACY

CHARGES AND SPECIFIC OFFENSES (LIST 1, 2, 3, ETC.) ☐ PICK-UP ☐ WARRANT ☒ COMPLAINT

1- Assault 2 120.05 sub 2 D Felony

PHYSICAL CONDITION
☒ APPARENTLY NORMAL
☐ OTHER (DESCRIBE)

DRUG ADDICT	TYPE USED	HOW LONG	AMOUNT USED DAILY	COST
☐ YES ☒ NO	XXX	XXX	XXX	XXX

☒ HAS FUNDS $6.54

AIDED NUMBERS

CAUSE OF ADDICTION ☐ MEDICAL ☐ OTHER
PREVIOUSLY ARRESTED FOR NARCOTICS OFFENSE ☐ YES ☐ NO
NUMBER OF TIMES
PREVIOUS TREATMENT ☐ YES ☐ NO
IF YES, DESCRIBE UNDER DETAILS

TELEPHONE CALLS (Limited to three free calls within N.Y.C.)

NUMBER	NAME OF PERSON CALLED	PURPOSE	TIME
	NO CALLS DESIRED X		

OTHER ARREST NUMBERS: None

PCT. PROPERTY VOUCHER NO.: None

EXACT LOCATION OF ARREST: F/O 220 E. 54th St., NYC NY

PRISONER'S ADDRESS VERIFIED BY: (Rank, Name, shield, command): PO Robert J. Moeser

DETAILS (include all pertinent information not recorded above)

DATE AND TIME RECORDED: 11-16-73

Refer to UF 61 #9719. At the time the Complaint was taken by uniformed officers the Complaintant stated that the above defendant did strike him on the head with an unknown object causing him a physical injury. The Comp was treated and released at Bellevue Hospital.

Attorneys present at station house and interviewed the defendant.
Attorney #1: David Carling
Attorney #2: Arlene

Attached [illegible] P.O. (F)

RANK	ARRESTING/ASSIGNED OFFICER	TAX REGISTRY NO.	SHIELD	COMMAND		ARRESTED BY:
PO	Robert J. Moeser	857901	27493	ACPU 17 Pct	☒ ON DUTY ☐ OFF DUTY ☒ PLAIN CLOTHES	☒ OFFICER ☐ COMPLAINANT ☐ OTHER (Describe under details)

DISPOSITION OF PRISONER: ☐ BAIL ☐ PERSONAL RECOGNIZANCE ☐ COURT ☒ OTHER
(Describe): [illegible] A/O [illegible]
RANK:
SIGNATURE OF DESK OFFICER:

ARREST REPORT

THE CITY OF NEW YORK
POLICE DEPARTMENT

500M-701739 (72) P.D. 244-156 (12-70)

EXHIBIT "B"

CRIMINAL COURT OF THE CITY OF NEW YORK

Part AR-1, County of New York, Borough of Manhattan

THE PEOPLE OF THE STATE OF NEW YORK vs. GINGER STEPHENSON, Defendant.	DOCKET NO.: N364385 CHARGE: Felonious Assault

November 16, 1973

BEFORE:

HON. HAROLD ROTHWAX,

Judge.

APPEARANCES:1

For the People:

PHILIP LA PENTA, Esq.
Assistant District Attorney
County of New York

For the Defendant:

ROBERT DOBRASH, Esq.
10 East 53rd Street
New York, New York

COLLIN G. STEPHEN, CSR
Official Court Reporter

EXHIBIT "C"

BRIDGEMAN: Docket Number N3648385, Ginger Stephenson, Felonious Assault. No drug addition in the case. Police officer Robert Moser of the 17th Precinct. Officer do you swear to the truth of the content of your affidavit?

OFFICER MOSER: I do.

BRIDGEMAN: There is notice on file.

MR. DOBRASH: Robert Dobrash, 10 East 53rd Street, New York.

THE COURT: Approach the bench, please.

(Discussion of the record).

THE COURT: Give me a date.

MR. PENTA: You will be excused, Officer. May we have the 20th?

MR. DOBRASH: I would like a later date.

MR. LA PENTA: What date?

MR. DOBRASH: The 27th is agreeable to both sides.

THE COURT: Put the matter on for November 27, 1973 in part AP-1. Case marked final against the People. Notify complainant.. Officer is excused. Defendant will be paroled, request for cross complaint. Referred to part AP-1. Papers so endorsed.

MR. DOBRASH: For the record, your Honor, I don't believe that this complaint really sets out a felonious assault. It was pointed out at the police station that there should be a simple assault. There was a private lawyer at the police station who requested a Vera Summons. The police refused to accept the word from the hope that the unknown instrument was a pin and not a deadly weapon and I want to state that for the record.

THE COURT: I don't believe assault in the second degree require the use of deadly weapon, it requires an instrument. It is dangerous when it is a castrophe. It is in same nature as assault in the third degree, but use of dangerous instrument, it becomes a felony for that reason. I doubt this will remain in a complaint at the present time.

MR. DOBRASH: I was not moving to-- I was demurring to the complainant. I want~~ed~~ to go on the record right here at arraignment to request -- the requests were made to the police to view this as a simple assault and to issue a Vera Sommons and they refused on the fact. I believe the fact they had at the time was adequate to charge a simple assault.

THE BRIDGEMAN: You are paroled. If you fail to reappear an additional charge of parole judge will lodge.

* * * *

Hereby certify this is a correct transcript to the best of my ability.

William R. Lewis

WILLIAM R. LEWIS,
Official Court Reporter in Charge

Criminal Court of the City of New York

Part .... , County of ............N.Y..........

STATE OF NEW YORK, } ss.:
COUNTY OF ...............N.Y................ }

FELONY COMPLAINT

P.O. Robert J. Moeser #27493

of ....17 PCT.................., County of .........N.Y........, State of ..N.Y....,

being duly sworn, deposes and says that on ....Nov 15, 1973........, at about ...9.25 p.m.

at ....909 Third Avenue inside the Main Post Office...................

in the County of ....................N.Y.........................., City and State of New York,

the defendants ....Ginger Stephenson...................................

committed the offenses of ....P.L. 120.05 Assault....................................

....

under the following circumstances:

Deponent states that he is informed by UF9719 that the defendant did with an unknown object strike one Joseph Scelza, 58-24 63 Street, Queens, NY on the head thereby causing Joseph Ecelza physical injury which required treatment at a hospital.

N364385

Sworn to before me

Nov 16, 19 73

HAROLD J. [illegible] .... Judge.

.... Deponent

Feb D.

259

ARRAIGNMENT

F-12

76 N [illegible]

DOCKET NUMBER

CRIMINAL COURT
OF THE CITY OF NEW YORK

Part AR1 County New York

The People of the State of New York
vs.

#1 Ginger Stephenson 38F
NAME AGE
220 East 54th Street Apt 6G
STREET ADDRESS
N.Y.
CITY STATE

#2 UNARRESTED
NAME AGE
STREET ADDRESS
CITY STATE

#3
NAME AGE
STREET ADDRESS
CITY STATE

#4
NAME AGE
STREET ADDRESS
CITY STATE

Defendants are charged with a violation of

P.L. 120.05 Assault

11/16 P.O. Robert Moeser #27493 17 PCT
OFFICER'S NAME SHIELD # COMMAND
826-3211
VACATION/LEAVE DUTY CHART
Y.B. 10.50 a.m.
PCT.—ARREST SERIAL # *Complaint prepared by*
Search Warrant #............Executed in this case.

Date Nov 16, 1973

The defendant upon appearing for arraignment:

______ was assigned Legal Aid Society counsel for arraignment only,

______ was assigned Legal Aid Society counsel,

✓ was represented by his own counsel,

______ was represented by himself,

______

✓ was furnished with a copy of the accusatory instrument filed against him.

______ was informed pursuant to section 180.10 of the CPL.

______ waived the requirement that he be informed pursuant to section 180.10 of the CPL.

______ was informed pursuant to section 1807-1 of the V.T.L.

______ was served with notice by the District Attorney pursuant to section 710.30-1a of the CPL.

______ was served with notice by the District Attorney pursuant to section 710.30-1b of the CPL.

______ was notified by the District Attorney pursuant to section [illegible] of the CPL.

______ Judge

To Part AP1
To Date 11/27/73

Bail Condition
#1 Final v. People INS. CO. BAIL BOND OR CASH BAIL
#2 [illegible] INS. CO. BAIL BOND OR CASH BAIL
#3 INS. CO. BAIL BOND OR CASH BAIL
#4 Req. for [illegible] comp INS. CO. BAIL BOND OR CASH BAIL

______ The defendant, upon being released on his own recognizance, was directed by the Court pursuant to section 510.40 of the CPL.

ADJ. REQUEST	PRESENT	ABSENT	NOTIFY	EXCUSED
People	[✓ Officer]	Officer	Officer	[✓ Officer]
Defense	Complainant	Complainant	[✓ Complainant]	Complainant
Consent	Defendant	Defendant	Defendant	
Court	Attorney	Attorney	Attorney	

SPEEDY TRIAL

______ Adjournment period to be excluded under 30.30 CP

______ Adjournment period to be charged under 30.30 CP

______ The defendant, being without counsel, consents t this adjournment after having been advised of his rights under th Speedy Trial Rules and the effect of his consent.

______ Psychiatric examination ordered
Custody
Out Patient

______ Narcotic examination ordered.

______ Medical attention required.

COLIN G. S[illegible]
Court Reporter

HAROLD J. ROT

NOV 16

______ ______
Date *Judge*

260

Criminal Court of the City of New York

NOTICE OF APPEARANCE

Part ...., County ....

Docket Number/Year

THE PEOPLE OF THE STATE OF NEW YORK

ON THE COMPLAINT OF

vs.

VIRGINIA Stephenson

Defendant

TO THE CLERK OF THE COURT:

You are hereby notified that I have been retained in the above-entitled action by

☑ the defendant.

☐ ....
Name Address

Attorney for the defendant Hoffinger Friedland & Roth By Robert Z Dobrish
Print Name Signature

Address 10 E 53rd St
NY NY

Telephone Number 421 9040

11/16/73
Dated: City of New York

Form CRC-260-100M
(Rev. 11/72) 919051(72) 346

Exh. F.

STATE OF NEW YORK - EXECUTIVE DEPARTMENT
DIVISION OF CRIMINAL JUSTICE SERVICES
IDENTIFICATION AND INFORMATION SYSTEM
EXECUTIVE PARK TOWER - STUYVESANT PLAZA - ALBANY, N.Y. 12203

11-16-73 0758 TRANS. NO. 061007

NO. 3646506Z
STEPHENSON,GINNY A SKIN TONE LIGHT SEX FEMALE HGT 5-08
STEPHENSON,GINNY A RACE WHITE BIRTH DATE 07-01-35 LOC. SPC. NO. 26446352C

3646506 =

M4659

CONFIDENTIAL TO: NY CITY POLICE DEPT HDQ
1 POLICE PLAZA
NEW YORK NY 10013

FAX M4659

1 Pg

* * * * * * SUMMARY CONTAINS ONLY NYS CRIMINAL EVENTS * * * * *
OUT-OF-STATE EVENTS, IF ANY, ARE IN "OTHER CRIMINAL HISTORY" SECTION

* * * * * * * SUMMARY * * * * * * * *

DATE	CHARGES	DISPOSITION
11-16-73	PL D FEL ASLT W/INT CAUSE PH INJ W/WEAP	

* * * * * * CRIMINAL HISTORY * * * * * *

ARREST: STEPHENSON,GINNY A
CRIME DATE/PLACE: 11-16-73 NEW YORK COUNTY NEW YORK AGENCY ID 01707570
ARREST DATE/PLACE: 11-16-73 NEW YORK COUNTY NEW YORK
AGENCY: NY CITY POLICE DEPT PCT 017 NEW YORK NY 10022
ARREST CHARGES:
PL 120.05 -02 CLASS D FEL ASLT W/INT CAUSE PH INJ W/WEAP NOTE 1

* * * * * * OTHER INFORMATION * * * * *

NAMES USED BY SUBJECT:
PREV 01 STEPHENSON,GINNY A
RECORDED ADDRESSES:
11-16-73 220 E 59TH ST NYC NEW YORK
BIRTH DATE/PLACE:
PREV 01 07-01-35 PREV 01 LEESBURG FLORIDA

Exh. G

CRIMINAL COURT OF THE CITY OF NEW YORK

PART AP-1, County of New York, Borough of Manhattan

-------------------------X

THE PEOPLE OF THE STATE OF NEW YORK : DOCKET NO.:
vs. : N364385
:
GINGER STEPHENSON, : CHARGE: 120.05
Defendant. :

-------------------------X

November 27, 1973

BEFORE:

HON. SHIRLEY LEVITTAN,

Judge.

APPEARANCES:

For the People:

GEORGE BOLEN, ESQ.
Assistant District Attorney
County of New York

For the Defendant:
ROBERT DOBRASH, Esq.
10 East 53d Street
New York, New York

ESTHER LEWIS,
Official Court Reporter

EXHIBIT "H"

BRIDGEMAN: Calendar Number 27and Calendar number 26, Ginger Stephenson on the charge of 120.05. Police officer Moser. The case is marked final versus the People. For Ginger Stephenson, Robert Dobrash, 10 East 53rd Street, New York.

MR. DOBRASH: The defendant is ready for a hearing.

BRIDGEMAN: Selser! No answer.

MR. BOLEN: At this time the People move to reduce the charges to Simple Assault, 120.00.

THE COURT: Reduced to assault.

MR. DOBRASH: I would point out that at the time of arraignment, Judge Rothwax referred to the hearing court the question of a cross complaint in this case.

THE COURT: Judge Rothwax will have to issue the cross complaint from the Bench. I will refer you to the lady in kthat part. She can go there fro here to the complaint room.

MR. DOBRASH: They won't take it, they will send her over to 346 Broadway.

THE COURT: I wouldn't no more constrain Judge Rothwax that he won't constrain me.

MR. DOBRASH: I am not asking you to issue it from the Bench.

THE COURT: This is marked final against the People. This is marked against the People from the arraignment.

MR. DOBRASH: Can we approach the Bench?

THE COURT: Final versus the People, Rothwax.

MR. BOLEN: Burt Judge --

THE COURT: I will not constrain Judge Rothwax that I will go against his marking. I will lgive you time.

MR. BOLEN: The complaint lives in Queens.

THE COURT: It's marked final. I am quite certain--

MR. BOLEN: I will ACD the case.

THE COURT: Nobody was apparently at the arraignment, only the officer. It might have been done because of something that the officer said. I don't know, but a final marking will be in order. I think Mr. Cohen is entitled to his say..

MR. BOLEN: The complainant did go to the hospital. It's highly unusual to have a case marked final at arraignment.

THE COURT: Not only in this Court is it unusual, it's marked final and will not go contrary to that marking. Further call.

* * * *

THE BRIDGEMAN: Call Calendar 27, George Rodriguez, charged with 265.05; 265.05; 120.05. The defendant is on parole, case is marked final versus the People. Defendant present.

THE COURT: There is a note on this one; final against the People; complainant not in Court and probably will not show on the adjourned date, and District Attorney wants to proceed.

MR. BOLEN: In view of that fact that the People move to dismiss.

THE COURT: Did you call to see if the complainant was here?

MR. BOLEN: No, your honor.

THE COURT: I think you should.

MR. BOLEN: I have a note on my paper -- this is no arrest, wasting the Court's time. James Anderson, I have a similar note.

THE COURT: All right, dismissed.

* * * * * *

I hereby certify that this is a correct transcript to the best of my ability.

William R. Lewis

WILLIAM R. LEWIS,
Official Court Reporter in Charge

267

Date
NOV 27 1975

Part
AP1

Reporter
Esther Lewis
Court Reporter

Judge
[illegible]LEY E. LEV[illegible]
SHIE[illegible]

Court Action

1

DISMISSED ON MOTION OF A.D.A.

Bail Condition
[illegible]

Adj. Request	Present	Absent	Notify	Excused
People	Officer	Officer	Officer	Officer
Defense	Complainant	Complainant	Complainant	Complainant
Consent	Defendant	Defendant	Defendant	
Court	Attorney	Attorney	Attorney	

Reason for Adjournment

SPEEDY TRIAL

_______________Adjournment period to be excluded under 30.30 CPL.

_______________Adjournment period to be charged under 30.30 CPL.

_______________The defendant, being without counsel, consents to this adjournment after having been advised of his rights under the Speedy Trial Rules and the effect of his consent.

_______________The defendant, upon being released on his own recognizance, was directed by the Court pursuant to section 510.40 of the CPL.

Date

Part

Reporter

Judge

Court Action

2

Bail Condition

Adj. Request	Present	Absent	Notify	Excused
People	Officer	Officer	Officer	Officer
Defense	Complainant	Complainant	Complainant	Complainant
Consent	Defendant	Defendant	Defendant	
Court	Attorney	Attorney	Attorney	

Reason for Adjournment

SPEEDY TRIAL

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Date

Part

Reporter

Judge

Court Action

3

Bail Condition

Adj. Request	Present	Absent	Notify	Excused
People	Officer	Officer	Officer	Officer
Defense	Complainant	Complainant	Complainant	Complainant
Consent	Defendant	Defendant	Defendant	
Court	Attorney	Attorney	Attorney	

Reason for Adjournment

SPEEDY TRIAL

_______________Adjournment period to be excluded under 30.30 CPL.

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_______________The defendant, being without counsel, consents to this adjournment after having been advised of his rights under the Speedy Trial Rules and the effect of his consent.

_______________The defendant, upon being released on his own recognizance, was directed by the Court pursuant to section 510.40 of the CPL.

Date

Part

Court Action

4

Exh. I

Adj. Request	Present	Absent	Notify	Excused
People	Officer	Officer	Officer	Officer
Defense	Complainant	Complainant	Complainant	Complainant
Consent	Defendant	Defendant	Defendant	
Court	Attorney	Attorney	Attorney	

Comm
by Com

UU6-6407-73

EXHIBIT "J"

CRIMINAL COURT OF THE
CITY OF NEW YORK

Part 450, County of N.Y.

TRANSCRIPT OF RECORD

Nº 100801

Docket No. N 364385 1973

THE PEOPLE OF THE STATE OF NEW YORK

vs.

NAME Ginger Stephenson AGE 26

ADDRESS 230 - E 54th St

CITY N.Y.C. STATE

OFFENSE 120.05

DATE OF OFFENSE 11/16/73

DISPOSITION Dismissed

DATE OF DISPOSITION 11/27/73

CRIMINAL COURT PART A.P. COUNTY NY

JUDGE Levittan

I hereby certify that this is a true transcript of record on file in the Criminal Court.

DATE 11/27 1973

Jevard

COURT CLERK

Form No. CRC 225.1-50M sets 71083(72) 346

EXHIBIT "K"

IDENTIFICATION SECTION / COURT DIVISION REQUEST FOR RETURN OF POLARIOD PHOTOGRAPHS' RE: Sec 79E Civil Rights Law

INSTRUCTIONS (To Court Division Administrative Section)

1. For subject listed below please comply and return any photographs in a sealed envelope to the IDENTIFICATION SECTION.
2. Note the name of the subject on the rear of the photograph
3. Complete all the captions on this form and return the form with or without photographs.

IDENTIFICATION SECTION **CORRESPONDENCE UNIT**	Ident. Sect. Control Number 6907		Date Sent to Court Division Admin. Section JAN 21 1974		
Defendants Last Name STEPHENSON	First GINNY		Sex F	Race W	Height 5-8
NYSID Number 3646506Z	'B' Number none	Date of Arrest 11-16-73		Precinct 17	Arrest No. 27493
Charges Aslt		Court & Docket Number (if known) CCNY - N364385			
COURT DIVISION **ADMINISTRATIVE SECTION** Documentation of request and assignment:	Date Request Received from the Ident. Section JAN 23 1974		Ct. Div. Control Number 657		
	Photo Search Assigned to Ct. Div. Unit W/O		Date JAN 23 1974		
COURT DIVISION **COURT SIGN IN UNIT** Search For Subjects Docket Number:	Date Search Request Received		DEFENDANTS CT DOCKET NUMBER		
	Photo Search Assigned to W/O		Sign In Unit Superior's Signature		
COURT DIVISION **COURT WARRANT OFFICER** Search of Court Records for Photographs:	Date of Polariod Photo Search by W/O JAN [illegible] 1974		Date this Form Ret'd. to Ct. D. [illegible]		
	Warrant Officer's Signature		W/O Tax Registry Number 837 599		

RESULTS OF THIS SEARCH REQUEST Ct. Div. Sign In Superior or Ct. Warrant Officer, check appropriate box (s)

☐ Photo NOT AVAILABLE. "343" Case, photographs destroyed due to defendant not being arraigned

☐ Photo NOT AVAILABLE. Warrant/Warrant Investigation form, PD374-152, was not with the Court Papers.

☐ Photo NOT AVAILABLE. Court papers disclose that the Warrant was issued to the Central Warrant Unit on date ______

☐ Photo NOT AVAILABLE. Warrant/Warrant Investigation form, PD374-152, indicates that a polariod photo was not taken.

☑ POLARIOD PHOTOGRAPH IS STAPLED TO THIS FORM. Number of photos attached 2

✓ Removal of Polariod Photographs from the Court Case file was noted on the PD374-152 by the W/O.

OTHER REMARKS

FOR USE BY CT. DIV. ADMIN. SECTION 657	FOR USE BY THE IDENT. SECTION

AS 120

Misc. 467
Rev. 9/72

The City of New York

POLICE DEPARTMENT
NEW YORK, N.Y. 10013

Date: 1/21/74

FROM: CORRESPONDENCE UNIT, IDENTIFICATION SECTION

TO: ________ DDRS ✓ ________ RES.PCT. SQD ________

OTHER COMMANDS: Co-17 Pct

SUBJECT: RETURN OF DOCUMENTS PURSUANT TO SECTION 79 E OF THE CIVIL RIGHTS LAW OF THE STATE OF NEW YORK.

INSTRUCTIONS

1. For subjects listed below please comply and return in a sealed envelope to the Identification Section.
2. Cut off any portion of Polaroid Photos that includes a member of this department.
3. Note the name of the subject on the rear of photograph.
4. Note number of photos or polaroid returned and if the complete set issued is unavailable, state reason below.

   a. Return all photographs on file including DD 52 File (Resident Known Criminal, K.G., Narcotic enforcement file, others if any)

   b. Return all Polaroid Photographs.

NAME: Ginny Stephenson
B# OR NYSIIS# 364 6906 Z

( ) MALE ☒ FEMALE
☒ WHITE ( ) BLACK
OTHER ________

DATE OF ARREST: 11/16/73- 17Pct.# 27493
CHARGES: Aslt.

OTHER ARRESTS:

HEIGHT: 5-0
COLOR NOT STATED:

Number of Photos ________ issued on ________

For use by Command/Officer Indicated .
No. of Photos Returned ________ No. of Photos Unavailable ________

NO PHOTOS

____
Rank, Signature

EXHIBIT "M"

SURNAME Stephenson	FIRST NAME Ginny	MIDDLE NAME A.
F.B.I. NO.		

ADDRESS (First N.Y.C. Fingerprint Arrest): 220 E. 54 St. NY

DATE OF BIRTH: 7-1-35

SEX: F

HEIGHT: 5 Ft. 8 In. W

N.Y.S.I. & I.S. NO.: 364 6506 Z

ADDITIONAL ALIAS OR REF./CROSSING

FINGERPRINT CLASSIFICATION:
22 M 01U 000 12
L 01U 000 13

RECORD NO.: 364 6506 Z

REF./CROSSING

DATE (First N.Y.C. Fingerprint Arrest): 11-16-73

CRIME(S) (First N.Y.C. Fingerprint Arrest): aslt.2

ALIAS OR NICKNAME: Virgina

DATE OF ARREST	NAME AND ADDRESS GIVEN	BOROUGH OR CITY, ARREST NO./PCT.	CHARGE	ARRESTING OFFICER	DATE, DISPOSITION, JUDGE AND COURT
x11-16-73	Ginny A. Stephenson	Manh. 17/27493	Aslt.2 120.05	Moeser 17	11/27/73- dismissed Jg. Levittan, CC AP1, N 364 385/73

F.P. RETD. 79e C. R.L.

DATE RECORD PREPARED

CONTINUED ON PAGE

The symbol "X" indicates entries unsupported by fingerprints.

Persons using or divulging such information for other than official use are in violation of law and will be prosecuted accordingly.

The COMMANDING OFFICER, IDENTIFICATION SECTION, certifies that the fingerprints of the above named person have been compared and, UNLESS OTHERWISE SPECIFIED, the foregoing is a true copy of the records of this section.

PRISONER'S CRIMINAL RECORD D.D. 24 (Rev. 4-68 S-1)

CITY OF NEW YORK – POLICE DEPARTMENT

EXHIBIT "N"

Criminal Court of The City of New York

☐ ARREST WARRANT

☐ BENCH WARRANT

Part ______ County ______ Docket Number/Year ______

In the Name of the People of the State of New York: To any Police Officer of the City of New York.

An appropriate accusatory instrument having been filed with this court

designating ______ as the defendant

and charging him with ______

☐ And the said defendant not having been arraigned upon the above described accusatory instrument:

☐ And the said defendant having previously been arraigned upon the above described accusatory instrument and having thereafter failed to appear as directed by this court:

You are therefore commanded forwith to arrest the above named defendant and bring him before this court without unnecessary delay. However, when a different procedure after arrest is mandated by the Criminal Procedure Law, you are to proceed in compliance with that mandate.

Dated: City of New York ______

By Order of the Court ______ Judge (Arrest Warrant) / Court Clerk (Bench Warrant)

☐ NYSIIS # Not available ☐ NYSIIS # Entered in # 12 Below.

BAIL CONDITION VIOLATED $ ______

CRC 320

NYSIIS W.P.R. NO.

PRINT/TYPE ALL CAPTIONS

1. DEFENDANT'S SURNAME: [illegible] FIRST: [illegible] M. I.
2. SEX: F
3. RACE: W
4.
5. DATE OF BIRTH MO. DAY YR.
6. HEIGHT FT. IN.: [illegible]
7. WEIGHT: [illegible] LBS.
8. HAIR COLOR: GR
9 - 10 - 11
12. MKU OA- NYSIIS OR B NUMBER: 5 [illegible]
13. SOCIAL SECURITY NO.
14. DRIVER'S LICENSE NO. ☐ OPR. ☐ CH.
15. STATE
16. YEAR EXPIRES
17. OFFENSE CODE
18. DATE WARRANT ISSUED MO. DAY YR.
19. COURT DOCKET NO. (OCA): N384385
20. FOR OFFICE USE ONLY (CT. DIV. SER. NO.)
20A. MISCELLANEOUS INFORMATION
21. DEFENDANT'S RESIDENCE ADDRESS: 220 E 54th St.
22. BOROUGH/CITY: NYC
23. STATE: NY
24. ZIP CODE
25. APT. NO.: 61[illegible]
26. DEFT. RES. PCT.: 17
27. DATE OF ARREST MO. DAY YR.: [illegible]
28. ARREST PCT.: 17 ~~250~~
29. ARREST NO.: 7570
30. PENAL LAW CHARGE NO.
32. LOCATION OF ARREST: 17 220 E 54 St.
33. OFFICE USE ONLY
34. NAME OF ARRESTING OFFICER: [illegible]
35. TAX REGISTRY NO.: [illegible] 5 7 9 0 1
36. DEPT. COMMAND CODE
37. FAX CONTROL NO.
38. DEFENDANT EMPLOYER'S NAME AND ADDRESS: [illegible]

Attach Polaroid Photo
Use Scotch Tape

Indicate if Photo was ☐ Not Attached

SIGNATURE

DATE

POLARIOD PHOTOGRAPH REMOVED
79-E, N.Y.S. Civil Rights Law

INSTRUCTIONS:
1. Arresting Officers complete all captions except shaded areas.
2. Court Clerk complete bail condition violated and caption 12 (if blank).
3. Court Division complete captions 17-18-19-20-33-37

PD 374-152 (Rev. 3-73)

WARRANT INVESTIGATION REPORT rank ______ name ______ shield ______

[illegible]

F. D. R. Station
New York, N.Y. 10022

December 21, 1973

Chief, Employment & Services Section
Room 3508, General Post Office
New York, New York 10001

ATTENTION: INJURY UNIT

On November 15, 1973 I was on guard duty on the 54th Street exit at FDR Station. A woman named Miss Ginger Stephenson who lives at 220 East 54 Street came to make a complaint. about the noise from one of our trailer trucks. She wanted to walk through the roadway and I told her that this was not permitted. She became very violent and struck me on the head. I am taking legal action and my lawyer is P. Laurino and he is located at 80 Bushwick Avenue, Brooklyn, New York.

Regular Mailhandler
Joseph Scelza

Joseph Scelza

EXHIBIT "P"

UNITED STATES POST OFFICE

OUR REF:

DATE: April 12, 1974

SUBJECT:

P.O.CL:

TO:

Chief, Employement & Services Section
Room 3508, General Post Office
New York, New York 10001

INJURY UNIT

Please be advised, as of this date, no settlement has been made regarding my injury of November 15, 1973.

My attorney is P. Laurino, 80 Bushwick, Brooklyn, New York.

Regular Mailhandler
Joseph Scelza
Joseph Scelza

EXHIBIT "Q"

UNITED STATES POST OFFIC

OUR REF:

DATE: June 27, 1975

SUBJECT:

P.O.CL:

TO:

Chief, Employment & Services Section
Room 3508, General Post Office
New York, New York 10001

Please be advised, as of this date, no settlement has been made regarding my injury of November 15, 1973.

My attorney is Shermet, Eliasberg, and Bzura-Sam Morris, 565 5th Avenue, New York 10017.

Regular Mailhandler
Joseph Scelza

Joseph Scelza

EXHIBIT "R"

UNITED STATES POST OFFICE

OUR REF: F. D. R. Station-New York-10022

DATE: March 5, 1976

SUBJECT: Joseph Scelza - Injured 11/15/73

P.O.CL:

TO:

Chief, Employment & Services Section
Room 3508, General Post Office
New York, New York 10001

Please be advised, a gettlement has been made regarding my injury of November 15, 1973, but as of this date, I received no funds. My attorney is Shermet-Eliasberg-Bzura-Sam Morriss, located at 565 5th Avenue, New York 10017.

Joseph Scelza
Regular Mailhandler -F.D.R. Station

Joseph Scelza

EXHIBIT "S"

DEFT. Geiger Stephenson
220 E. 54 St.
NYC NY 10022

Fees paid $3.18

S.C. 12979 1974

1975

COPY.

3168

Notice mailed NOV 1 1974

Ret. undel.

Delivered 11-4-74

Receipt signed ~~Deft.~~ Agent ✓

Add. fee of cents paid by

Claimant Joseph Scelza
58-24 63 St.
Maspeth NY 11378

Second notice to deft. delivered

Undelivered

Receipt signed by Deft. Agent

FILED
CLERK'S OFFICE
JAN 10 1975
CIVIL COURT
QUEENS COUNTY

Judgment for claimant upon default and inquest $ Costs $ Dis. $ Total $

Judgment for $ Costs $ Dis. $ after trial Total $

Execution stayed to

All Proceedings stayed pending payment of $ Per Beginning

Exec. issued to Marshal or Sheriff

Exec. returned Satisfied Unsatisfied

Claim signed memo. to claimant OCT-30-1974

Claim by someone in claimant's behalf

Hearing set for NOV 25-1974

Claimant's Atty. Samuel Morris 565 5th Ave NY

Address

Dft's. Atty. Robert M Schwartz 401 B'way

Address

Leave to file answer & counterclaim granted. A.L.

If not paid trial 2/18/75 J.C.

TRANS CC

Adj. to 1/9 Trial vs Deft.

~~app~~ R.

EXHIBIT "T"

an.

CIVIL COURT OF THE CITY OF NEW YORK

Cause of action $500.00

Personal injury as the result of assault by deft on Nov 15 1973, pain & anguish. Loss of time from work

In Behalf of Claimant

x Joseph Scalza
Claimant

Answer

In Behalf of Defendant

Defendant

43-1016 79M-726035(73) 346

60

INDEX NO. 3168/75	CIVIL COURT—		CAL. NO. 75Q 12593
CLASSIFICATION	AMOUNT 10,000.00	DATE FILED 10/6/75	NOTICED FOR 10/20/75
ISSUE JOINED 1/9/75	NON-JURY ☒ CC 10000 JURY ☐	NO. JURORS	JURY FILED

Virginia Ann Stephenson

JOSEPH SCELZA PLAINTIFF vs GINGER STEPHENSON DEFE

SHERWIT, E & B 565 5TH AVE., NYC ATTORNEY ~~R. N. SCHWARTZ 401 B'WAY, NYC~~ ATTO

10017 682-1955 ADDRESS 10013 966-4290 ADDR

PHONE NO. JAS. McDONALD, ESQ. ~~[illegible]~~ KG-421

KEW GARDENS

85-29 67 Drive
Forest Hills, N.Y.

DEC 10 1975 PART 5 THOMAS V. LAFAUCI

DISPOSITI

[illegible]

8-1976 [illegible]

(Over)

Thomas V. Laf
JAN 15 1976
DATE

1/14/76 P/A HELD - Must proceed to trial with or without attorney. Mark [illegible] for TRIAL

EXHIBIT "U"

Index Number________________Year 19

CAL # 75Q 12593

Civil Court of The City of New York

COUNTY OF Queens

Joseph Scelza Plaintiff against Virginia Ann Stephenson AKA Ginger Stephenson Defendant	DECISION THOMAS V. LaFAUCI Judge of the Civil Court Queens County Presiding Thomas V LaFauci JCC

I hereby find and decide that After trial January 15, 1975 that judgment be made in favor of the plaintiff against defendant in amount of $650.00 Defendant's counterclaim is dismissed

(See decision on the record).

Martin Schwartz CCS

JAN 15 1976

and I order and adjudge that said plaintiff have judgment accordingly.

_______________days stay of execution.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS

- X

JOSEPH SCELZA,

75Q 12593

Plaintiff,

-against-

INDEX NO. 3168/75

GINGER STEPHENSON,

Defendant.

- X

DECISION

HON. THOMAS V. LAFAUCI, Judge

In this action, the plaintiff Joseph Scelza, seeks to recover damages for personal injuries consisting of laceration of the scalp requiring three stitches.

The defendant Ginger Stephenson, also known as Virginia Stephenson, answered the summons and complaint which action was originally commenced in Small Claims Court but by motion granted on July 6, 1975, the plaintiff was permitted to amend his complaint to increase the addendum clause to $10,000.

The defendant interposed a counterclaim for assault and false arrest and demanded judgment for $10,000.

The case was tried by the Court without a jury. The plaintiff testified that he was on duty with the Post Office Department at a postal loading area between 54th and 55th Street in the City of New York on November 15, 1973. The plaintiff further testified that the defendant came into the area while he and a security police officer, a witness Clarence Downey approached her. The defendant complained that trucks of the post office were parked with motors running and causing pollution in the area and she was going through to complaint

The plaintiff and the police security guard stretched their hands sideways to prevent her from passing and the witness Clarence Downey testified that he told the defendant to go to the employees' entrance where she could make a complaint to the supervisor.

The plaintiff said the defendant pushed her way through, scratch his face, that his hat fell off. He felt something in his back. He began bleeding and felt faint. He was thereafter given emergency treatment by a nurse and was taken to Bellevue Hospital for further treatment. A copy of the medical report of said hospital was submitted in evidence. ~~and~~ The plaintiff was sent home after emergency treatment. He further claims he was out of work for approximately 15 days and that he had to use his sick leave for time away from work. He also submitted bills in evidenc showing that he went to a Dr. Joseph N. Savino who took X-rays at a cost of $25.00. He further submitted in evidence a medical statement of Dr. J. N. Gigante, which indicated the Doctor removed three sutures on November 19, 1973 caused by a laceration of the scalp for which the Doctor did not charge the plaintiff. The bill for hospital service was paid by the employer of the plaintiff.

The defendant testified that she went to the loading area of the post office. She saw two armed guards. She asked them to get the supervisor and they refused to let her walk through and she stated, "Don't touch me or I will scream." She conceded the fact that neither guard had touched her but she began to scream. She further testified that the plaintiff, Joseph Scelza, ran over from the platform and hit her in the stomach and that she hit back in defense as a reflex action. She also stated that the plaintiff chased her down the street. Then she left the scene and she was arrested by a police officer several hours thereafter. She admitted that she had hit the ballpoint pen but she did not know where she struck him. On cross-examination she stated that she saw the plaintiff on the platform and while she was screaming, he ran over to her and punched her in the stomach without saying a word.

The Criminal case ultimately was dismissed as indicated by Exhibit A, in evidence. The defendant testified that the case was dismissed for lack of prosecution after the plaintiff failed to show up. There wARE no official records of the Criminal Court Case OTHER THAN EXHIBIT A AND B. ~~It was not~~ NONE WERE subpoenaed and there was no evidence as to who initiated the complaint except for Exhibit B, which was submitted to the Court and which indicates that a Robert J. Moeser, a policeman of the City of New York, In his affidavit stated, "Deponent states that he is informed by U.F. 9719 that the defendant did with an unknown object strike one, Joseph Scelza, 58-24 63rd Street, Queens, New York , on the head thereby causing Joseph Scelza physical injury which required treatment at a hospital."

There is no proof that the plaintiff signed any accompanying affidavit nor is there proof that he initiated the proceeding in Criminal Court.

With regards to the counterclaim of the defendant for assault, although she states that the plaintiff ran down from the platform and punched her in the stomach without saying a words, it appears that is incredible. The Court finds against the defendant on said cause of action.

With regards to the action for false arrest, the Court had no proof of who initiated the proceeding nor was any proof submitted that the plaintiff initiated said proceeding and signed any affidavit or complaint. In the absence of said evidence, the Court must find against the

The Court finds that the plaintiff did sustain an injury caused by the defendant without provocation on his part; that the plaintiff did sustain a laceration as a result of the blow to the back of his head which required three stitches; he did go to the hospital for emergency treatment; he had X-rays taken and had stitches removed. He further claims he lost sick leave time from his employment.

Considering all the evidence and the circumstances herein, the Court finds that the plaintiff has sustained a burden of proof by a fair preponderance of the credible evidence and is awarded judgment for $650.00.

Dated: January 16, 1976

J.C.C.
THOMAS V. LaFAUCI
Judge of the Civil Court
Queens County

IHB:lnd
08-3243

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

-v- : S 76 Cr. 988 (RO)

DENNIS W. MULLIGAN, :

D[illegible]nt. :

- - - - - - - - - - - - - - - - - - - -x

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE THE VERDICT

Introductory Statement

After a ten-day trial, defendant Dennis W. Mulligan was found guilty by the jury on June 20, 1977 of one count of making a false material declaration before a duly empaneled Grand Jury in violation of Title 18, United States Code, Section 1623; the jury failed to agree on a verdict as to the other charges against Mulligan or as to the charges against his co-defendant. Nearly one month later, by notice of motion dated and filed July 13, 1977, the defense seeks to upset that verdict because one member of the jury panel, Ms. Virginia Stephenson, did not volunteer on the voir dire that she had been arrested 3 1/2 years earlier on a charge which was immediately dismissed, the precipitant of which became the subject of civil litigation. As explained in this memorandum and in the accompanying affidavit of Assistant United States Attorney Ira H. Block, sworn to August 11, 1977 ("Block aff't"), and exhibits, there is neither factual nor legal foundation for Mulligan's claim that juror Stephenson "intentionally concealed prejudicial information during the voir dire" requiring setting aside of the jury's verdict. Accordingly, the motion for a new trial should be denied.

Argument

THE JURY'S VERDICT SHOULD STAND

Defendant asserts that he is entitled to a new trial as a result of his belated discovery that juror Stephenson had once been arrested. Had this information been volunteered by Ms. Stephenson on *voir dire*, or so the argument goes, she would *in all probability* have been excused by the Court as biased, and failing that, by the defense peremptorily. According to the defense, this result follows ineluctably as a matter of law from their proposition that the juror perjured herself in responding "No, sir" to the Court's inquiry whether she had "ever been involved in a criminal case." Although this syllogistic argument is perhaps imaginative, both the major and minor premises are, as we shall show, totally without factual or legal foundation in the circumstances of this case.

IHB:lnd
08-3243

A. Juror Stephenson Did Not Perjure Herself On The Voir Dire.

The first error of defendant's all too facile attempt to impeach the jury verdict rendered after a thoroughly fair trial is his one-sided presentation of the background and circumstances of juror Stephenson's arrest and subsequent judicial proceedings. Although it is implied that the unnamed private investigator whom the defense directed to conduct a background investigation of the juror was thorough in his task, this evidently was not so. As detailed in the accompanying affidavit, the charges against Ms. Stephenson were dismissed at the first scheduled court appearance after initial arraignment (Block aff't, ¶ 6) and, thereafter, at her request, photographs and fingerprints taken upon her arrest were removed from the New York City Police Department and FBI files in accordance with the provisions of Section 79-e of the New York Civil Rights Law. (Block aff't, ¶¶ 7-9). Further, the incident which precipitated the arrest was pursued by the complainant, a postal employee, as a civil matter in the courts, and a monetary judgment against Ms. Stephenson was obtained. (Block aff't, ¶13). Viewed in this context, we respectfully submit that it is far from "establishe[d] beyond dispute that this juror perjured herself on matters of critical importance" during the _voir dire_. _See_ Affidavit of

Paul A. Goldberger, sworn to July 13, 1977 ("Goldberger aff't"), ¶ 5.

The relevant question asked of juror Stephenson was: "You or your family ever been involved in a criminal case?" Tr. 111.* Earlier the Court had advised the entire panel of prospective jurors that the short-hand phrase "ever been involved" referred to the status of victim, complainant, witness or defendant. See, e.g., Tr. 10, 17. Here the applicable status was "defendant." While the defense urges that "it is inconceivable that this juror could have forgotten anything as serious as her own arrest on charges of having committed a violent felony" (Goldberger aff't, ¶5; emphasis supplied), the plain fact is that the Court neither inquired of this juror nor any other whether they had ever been arrested.** Ms. Stephenson's failure to acknowledge her prior arrest in response to the broader, amorphous "ever been involved" query must be viewed in this perspective.

The status of "being a defendant in a criminal case" is a phrase of art. Its application and significance, though perhaps clear enough to those schooled in the criminal law, is not nearly so well-defined for laymen. Moreover, this dichotomy between the meaning of legal phrases to lawyers and judges, on the one hand, and to ordinary citizens, on the other, has previously been expressly recognized in a context identical to that presented by the instant motion. Affirming denial of a new trial motion predicated upon alleged false answers and concealment of material information by jurors on the voir dire in Orenberg v. Thecker, 143 F.2d 375, 377-78 (D.C. Cir. 1944), the Court of Appeals for the D.C. Circuit observed:

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* The prefix "Tr." followed by a number refers to pages within the transcript of the voir dire examination conducted on June 7, 1977.

** The Government sought to have the Court inquire whether "any juror... [had] ever been charged with a crime." See Government's Proposed Examination of Prospective Jurors, item 7. The defense submitted no voir dire requests.

> "It can be too easily assumed that laymen called from ways of life far removed from the courtroom, will understand words and terms of art customarily used by lawyers and judges. . . . It would be a violent assumption that such laymen will be alert to give considered answers to questions containing several such words or terms, or that failure to respond constitutes concealment or a false answer. . . . It would be asking a great deal of laymen that they be certain and confident in the use of lawyers' words when lawyers themselves disagree as to their meaning. It would be grim irony to insist that our juries must constitute a representative cross section of all the people if at the same time impossible standards of perfection were imposed."

Indeed, it has been held that "[w]hen voir dire questions can be interpreted logically to mean something else to a juror, then a literal non-disclosure on another reading of the question cannot be assumed merely for failure to answer the question according to its intended meaning." United States v. Robbins, 500 F.2d 650, 652 n.2 (5th Cir. 1974).

Stated another way, ambiguity in a voir dire question or response may not form the basis for a claim of deliberate concealment of a known disqualification or other perjurious obstruction of the selection process by a juror. DeRosier v. United States, 407 F.2d 959, 963 (8th Cir. 1969); Brown v. United States, 356 F.2d 230, 232-33 (10th Cir. 1966).

In the instant case the imprecise phraseology "ever been involved in a criminal case," even with the prefatory "defendant" gloss, cannot be said unequivocally to embrace someone in Ms. Stephenson's position. As appears from the records of the New York City Criminal Court submitted by the Government, no adversary proceedings of any sort were conducted in that court in connection with the charge against her. In contrast, the lawsuit brought against juror Stephenson in the Small Claims Part of the New York City Civil Court resulted in the interposition of a counterclaim, the transfer of the case to a Trial Part and the ultimate adversary proceeding, a trial. (Block aff't ¶ 13). The judge who presided at the trial rendered a written opinion and a monetary judgment was entered against Ms. Stephenson. (Id., Ex. W). Considering the nearly immediate truncation of the post-arrest proceedings against her and that the dispute which led to the arrest was from the outset handled as a civil matter by the complaining party, it is understandable that as a layperson Ms. Stephenson would have responded as she did to the generalized inquiry of "involvement" with a criminal case.

In any event, whatever ambiguity -- actual or potential -- existed in the question and this, or any other juror's response thereto, it was counsel's responsibility thoroughly to probe the possibility of a juror having been arrested by members of the New York City Police Department or other authority if such subject matter was deemed material by the defense to selection of a fair and impartial jury to hear and determine the case against Mulligan. *See Andrade v. United Fruit Co.*, 312 F.2d 889 (2d Cir. 1969); *DeRosier v. United States*, *supra*, 407 F.2d at 963. Here, as already noted, there was utterly no attempt by the defense to explore as part of the jurors' mental set subliminal bias resulting from unjust arrest although it would have been quite easy to request that appropriate questions on that point be asked, *see United States v. Baker*, 266 F. Supp. 461, 463 (D.D.C. 1967), *remanded on other grounds*, 401 F.2d 958 (D.C.Cir. 1968), and the Court repeatedly afforded counsel the opportunity to propound additional questions. *See Mikus v. United States*, 433 F.2d 719, 724 (2d Cir. 1970); *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir. 1968), *cert. denied*, 393 U.S. 1120 (1969).

Obviously, there was no defense interest in challenging jurors who may have undergone such an experience.* Counsel's hindsight suggestion that had Ms. Stephenson volunteered all of the facts and circumstances which post-verdict investigation of the juror brought to his attention she would not have been empaneled merely highlights his retrospective regret at failing to request specific inquiry on the voir dire about arrests.** See Marshall v. United States, 355 F.2d 999, 1008 (9th Cir.), cert. denied, 385 U.S. 815 (1966).

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* Examination of the transcript of the voir dire discloses that the defense was preoccupied with a juror's experiences with the criminal justice system as victim, not as one accused of committing a crime. See, e.g., Tr. 85, 98, 111. Furthermore, where jurors disclosed that some relative had been accused of a crime, defense counsel evinced an interest only in the outcome of the case, particularly whether or not a trial had been held. See, e.g., Tr. 20, 78. Likewise, despite the Government's suggestion that one juror twice previously arrested be excused for cause upon consent, the defense refused. See Tr. 103-07.

** "Counsel has every right to propound questions to the jury on which the Court has overlooked, in order to aid him in exercising his peremptory challenge." DeRosier v. United States, supra, 407 F.2d at 963. When this right is not invoked -- at least with respect to a discrete subject matter such as prior arrest -- it must be assumed that jury selection strategy is the explanation, not oversight or incompetence.

IHB:lq
08-3243

What is even more revealing, however, of the flimsiness of Mulligan's claim that juror Stephenson perjured herself by replying "No, sir" to the Court's "ever been involved" query is that shortly after the charge on which she had been arrested was dismissed on November 27, 1973, Ms. Stephenson invoked the procedures prescribed by New York Civil Rights Law §79-e* for the return of fingerprints and photographs taken upon her arrest. (Block aff't, ¶ 7). These items were turned back to Ms. Stephenson or her legal representative in early 1974. Id., ¶ 9. The policy underlying statutes such as Civil Rights Law §79-e providing for return of fingerprints and the understanding of this practice fostered among its beneficiaries is that one isolated incident will not forever haunt a person previously accused for whom the presumption of innocence was never overcome by a finding of guilt.** Cf. 18 U.S.C. §§ 5021, 5038. See

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* The text of that provision, since repealed (see infra, p.9), is set forth in the Addendum.

** In approving enactment of the legislation (Laws of 1976, Chapter 877) repealing Civil Rights Law § 79-e and replacing it with Criminal Procedure Law § 160.50 (see text, infra), Governor Carey stated:

> "The bill, which is part of my 1976 Legislative Program, is designed to protect the rights of individuals against whom criminal charges have been brought, but

FOOTNOTE CONTINUED ON NEXT PAGE

generally *Mestre Morrea* v. *Immigration & Naturalization Service*, 462 F.2d 1030, 1032 (1st Cir. 1972). That salutary policy is applicable here.

Effective September 1, 1976, Civil Rights Law §79-e was repealed and replaced with a new provision in the state Criminal Procedure Law designated as Section 160.50.* 1976 Session Laws of New York, Chapter 877, Sections 1, 3, 5. While for present purposes it is not necessary to catalog the differences between the old and new provisions for the return of fingerprints and photographs of an accused upon favorable termination of a criminal action, it is relevant to note that CPL § 160.50 substantially broadened the

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CONTINUATION OF FOOTNOTE FROM PREVIOUS PAGE

> which did not ultimately result in a conviction.
>
> * * *
>
> This legislation is consistent with the presumption of innocence, which simply means that no individual should suffer adverse consequences merely on the basis of an accusation, unless the charges were ultimately sustained in a court of law."

1976 McKinney's Session Law News of New York, No. 8, p. A-395-96.

* The text of Section 160.50 is set forth in the Addendum.

protection available to an exonerated accused in Ms. Stephenson's position. The legislature even provided for retroactive extension of these broadened benefits to persons who previously had obtained return of arrest identifying records under §79-e, and even those who never previously sought to invoke the procedures of the predecessor statute. *See* CPL § 160.50 subd. 3. Most significantly, however, in 1976 the legislature infused much additional vitality to the presumption of innocence for persons in Ms. Stephenson's position by adding to the Criminal Procedure Law a companion provision definitively pronouncing the significance to an accused of favorable termination of a criminal action. Designated as § 160.60, that enactment provides:

> "§ 160.60 Effect of termination of criminal actions in favor of the accused.
>
> Upon the termination of a criminal action or proceeding against a person in favor of such person, as defined in subdivision two of section 160.50 of this chapter, *the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution*. The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, *no such person shall be required to divulge information pertaining to the arrest or prosecution*." (Emphasis supplied).

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CPL § 160.60, by its express terms, applies to persons in juror Stephenson's position and is illuminating on the question of her alleged willful and perjurious concealment of material information on the voir dire, assuming that she even understood and recognized her prior technical status as a defendant in a criminal case. While the Government does not suggest that CPL § 160.60 would not yield in favor of the Supremacy Clause when, as and if the competing considerations of the state enactment and the process of selecting an impartial jury in a Federal criminal trial were on a collision course, we do not believe that intriguing constitutional issue is presented or need be resolved on this motion. Rather the charge leveled by the defense being that juror Stephenson committed the crime of perjury (and, necessarily, contempt as well) by her response, "No, sir," the provisions of CPL §§ 160.50 and 160.60 and Civil Rights Law §79-e, and the policies which they represent, are highly relevant, we respectfully submit, in an assessment of the deliberateness of juror Stephenson's non-disclosure of what may be termed "the Scelza incident".* *Cf. United States v. Freedland*, 111 F. Supp. 852, 854-55 (D.N.D. 1953) (juror acquitted of criminal contempt alleged as a result of *voir dire* denial of having previously been convicted of a criminal offense where, though convicted, he had received Governor's pardon and been advised that pardon wiped out effects of the conviction); *United States v. Baker*, *supra*, 266 F. Supp. at 463 (new trial denied where juror was reserve police officer but failed to disclose this status in response to *voir dire* query concerning "connection" with police department because on prior occasion judge told him he was not a police officer).

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* Interestingly, prior to enactment of CPL § 160.60 in 1976, Congress had enacted a similar protective provision for first time, youthful narcotic offenders accused of misdemeanor possession of a controlled substance. *See* Public Law 91-513, Title II, § 404, 84 Stat. 1264, *codified at* 21 U.S.C. § 844(b). This statute provides that an order of dismissal may be entered, the effect of which "*shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information.*" (Emphasis supplied). Most significantly, however, Congress has decreed that when such an order of dismissal has been entered the accused need not under any circumstances reveal his past peccadillo:

> "No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest or indictment or information, or trial in response to any inquiry made of him for any purpose."

In light of the ambiguity of the voir dire inquiry, counsel's disinterest in pursuing the matter of arrest without conviction, the self-initiated expunction of official records of her arrest, and New York's public policy declaring a subsequently dismissed arrest "a nullity," restoring the arrestee to the status quo ante and providing that the arrestee shall not "be required to divulge information pertaining to the arrest or prosecution," it is manifest that the non-disclosure of the Scelza incident was inadvertent and without purpose of obstructing the jury selection process. As a matter of law, therefore, a new trial will not be granted unless Mulligan has persuasively demonstrated that his right to a fair trial has been so compromised by the non-disclosure that justice has not been done. This the defendant has wholly failed to do.

B. Mulligan Has Completely Failed To Demonstrate Prejudice Resulting From Ms. Stephenson's Service On The Jury Which Convicted Him.

Stripped of its accompanying rhetoric, the defendant's position on this motion seems to be that the verdict should be set aside and a new trial had simply because he and his counsel were unaware of the Scelza incident while the jury was being selected. Such is not the law. Where a new trial is sought on the ground that a prospective juror failed to disclose material information during examination as to his qualifications, it is the defense burden satisfactorily to establish that "the juror deliberately attempted to deceive the Court by intentionally concealing facts reasonably called for by a question and that the defendant was prejudiced thereby." United States v. Baker, supra, 266 F. Supp. at 462-63 (emphasis added). See also Turner v. United States, 416 F.2d 815, 817 (D.C.Cir 1969); Marshall v. United States, supra, 355 F.2d at 1009. As discussed above, Ms. Stephenson's conduct on the voir dire was not concealment of information which she necessarily would understand to be responsive to the inquiry nor, if she so understood the scope and intent of the question, was any concealment of information other than in good faith reliance on the favorable termination of the charges against her. This circumstance alone warrants denial of Mulligan's motion. In any event, however, the motion must fail because, as logic, experience in the trial of Federal criminal cases and well-established legal precedent make manifest, Mulligan has totally failed to sustain the required showing of prejudice to his right to a fair and impartial trial from Ms. Stephenson's presence on the jury.

The affirmative of the issue of juror impartiality is upon the challenger, Mikus v. United States, supra, 433 F.2d at 723; United States v. Ragland, 375 F.2d 471, 475 (2d Cir. 1967), cert. denied. 390 U.S. 925 (1968), and in any trial the law presumes that the jury is impartial and unbiased. United States v. Wayman, 510 F.2d 1020, 1024 (5th Cir. 1975); United States v. Brasco, 385 F. Supp. 966, 968-69 (S.D.N.Y. 1974, aff'd, 516 F.2d 816 (2d Cir.), cert. denied, 423 U.S. 860 1975). Unless and until this presumptive validity of the jury verdict is overcome by competent credible evidence establishing essential unfairness and prejudice of constitutional dimension, the movant has not shouldered his burden and a new trial is not required. United States v. Provenzano, 240 F. Supp. 393, 408 (D.N.J.), aff'd per curaim, 353 F.2d 1011 (3d Cir. 1965), cert. denied, 384 U.S. 905 (1966). Cf. United States v. Silverman, 449 F.2d 1341, 1344 (2d Cir. 1971) cert. denied, 405 U.S. 918 (1972); United States v. Ellenbogen, 365 F.2d 982, 989 (2d Cir. 1966), cert denied, 386 U.S. 923 (1967).

Mulligan's effort to meet this high threshhold falls far short of the mark, speculating as he does, that because juror Stephenson was "in all likelihood" once arrested by a member of the New York City Police Department and "booked and fingerprinted" "in one of the station houses of that same force," she perjured herself so that she could "remain on the jury to avenge her earlier treatment at the hands of other members of the New York City police force." Goldberger aff't, ¶¶ 7,8. Aside from the pure sophistry of this argument that the unanimous verdict of Mulligan's guilt of one count of false swearing necessarily demonstrates emasculation of Mulligan's right to a fair trial from Ms. Stephenson's presence on the jury, this reasoning all too conveniently ignores the fact that Ms. Stephenson's arrest and her related experience with the New York City Police Department were direct consequences of the bad neighborliness of the United States Postal Service facility adjoining her residence and the complaint to the police made by a Postal Service watchman, Mr. Joseph Scelza. See Block aff't, ¶ 4, Ex. W. Had Scelza not pressed the matter with the police, there would have been no arrest, no booking, no need to hire a lawyer, no court appearances or testimony, no monetary judgment outstanding against her, etc. Surely, considering these circumstances, any unconscious leaning this juror might conceivably have possessed at the start of the trial would have been adverse to the United States.*

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* The experience of this Court no doubt suggests the empty ring to the defense suggestion that had a challenge for cause to Ms. Stephenson based on the Scelza incident been denied - a prospect highly likely of occurrence, they would have peremptorily excused her. Persons accused of a crime -- no doubt from their perspective unjustly -- against whom all charges are dismissed soon after arrest and arraignment, are universally considered to be ideal defense jurors inasmuch as they have a unique personal understanding of the protectiveness of the presumption of innocence. Cf. Bush v. United States, 16 F.2d 709, 711 (5th Cir. 1927) (denial of new trial affirmed where doubtful that had counsel learned during voir dire juror was under indictment defense would have objected). If anything, it would seem that the Government, not the defense, would have sought discharge of Ms. Stephenson from the panel. But, of course, the prejudice which Mulligan is required to show is not that had the Scelza incident been disclosed on voir dire, Ms. Stephenson would have been precluded from voting for conviction by reason of the Government's earlier exercise of a peremptory challenge. If such were the rule, all convicted defendants would be entitled to new trials because of the prejudice resulting from the jury's vote to convict.

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Faced with a similar failure to "raise a contention of bias from the realm of speculation to the realm of fact," Mikus v. United States, supra, 433 F.2d at 724, the Court of Appeals for this Circuit held in United States v. Eury, 268 F.2d 517 (2d Cir. 1959), that a defendant was not entitled to a new trial as a result of claimed juror misconduct indistinguishable from that charged here.

The defendant in Eury was a building contractor accused of making a false statement to the Federal Housing Administration. After conviction he moved for a new trial on the ground that on voir dire one juror had affirmed that "she had never been involved in any business dealings with any builder, and that there was nothing in her experience which would cause her to be prejudiced against a builder or contractor" whereas in fact she had lost a considerable sum in business dealings with a contractor who was also her brother-in-law. 268 F.2d at 521-22 (emphasis added). Writing for a unanimous panel, Judge Waterman easily rebuffed the defense claim that the verdict should have been set aside, stating that the juror's past unfortunate experience with another practitioner of the defendant's occupation was not "so obvious a disqualification or so inherently prejudicial as a matter of law ... as to require the granting of a new trial."* Id. at 522. In language equally appropriate to the claim of juror mis conduct in this case as it was to Eury's plaint, Judge Waterman then went on to explain the ratio decidendi of the Court of Appeals' decision:

> "We cannot assume that whatever continuing bitterness the juror might have because of her loss would be directed against anyone other than the person with whom she had been involved; or that if directed against others, those others would be 'contractors' as a class rather than 'brothers-in-law' or members of her husband's family." Id.

The Second Circuit's decision in Eury, we respectfully submit, is controlling here inasmuch as "whatever continuing bitterness" juror Stephenson retained as a result of her arrest cannot be assumed to have been directed against defendant Dennis W. Mulligan, rather than postal employee Joseph Scelza, Police Officer Moeser who acted on Scelza's complaint by arresting Ms. Stephenson, or postal or other Federal employees in general.**

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* As authority for this proposition, Cavness v. United States, 187 F.2d 719 (9th Cir.), cert denied, 341 U.S. 951 (1951), was cited. In Cavness new trial denial was approved over objection that a venireman had concealed the fact that he was a reserve officer in the Honolulu Police Department notwithstanding a general question on voir dire addressed to this very subject.

** In this connection it is significant to note that although Ms. Stephenson sought to file a cross-complaint against Mr. Scelza when she was initially presented for arraignment (Block aff't, ¶ 5), and counterclaimed against him for assault and false arrest in response to the Small Claims action which he filed (Block aff't, ¶ 13), she never made complaint against officer Moeser. Block aff't, ¶ 14. This circumstance compellingly suggests that Ms. Stephenson's lingering animus, if any there be, was directed toward Postal Employee Scelza and his co-workers and not officer Moeser and his brother officers. Cf. Tr. 12.

The Eury decision is but one example of a substantial number of decisions within the Circuits instructing that a jury verdict in a criminal case reached after a fair trial and proper deliberations will not be disturbed when after-the-fact claims of voir dire misconduct by jurors are interposed unsupported by cogent demonstration of actual prejudice. See, e.g., Third Circuit: Woods v. United States, 364 F.2d 481, 483 (3d Cir.), cert. denied, 385 U.S. 972 (1966) (juror's failure to disclose dealings with the F.H.A. in response to question asked of panel in prosecution for filing false statement with F.H.A.); United States v. Provenzano, supra, 240 F. Supp. at 410 (union member juror's concealment of alleged bias against defendant, a prominent labor union official); Fifth Circuit: United States v. Wayman, supra, 510 F.2d at 1023-24 (silence in response to question asked of panel concerning juror's business or social dealings with defendants); United States v. Robbins, supra, 500 F.2d at 652-54 (juror failed to reveal that her daughter had been hospitalized because of the use of prescription diet pills in response to inquiry concerning bad experiences with doctors or substances mentioned in indictment charging physician with dispensing controlled substances improperly); Eighth Circuit: Shahane v. United States, 517 F.2d 1173, 1178-79 (8th Cir.), cert. denied, 423 U.S. 893 (1975) (non-revelation by juror in narcotics prosecution that she shared prevailing community views regarding hair length and drug use); DeRosier v. United States, supra, 407 F.2d at 962-64 (non-disclosure of juror's acquaintance with one of the defendants who later became a prosecution witness at the trial); Connelly v. United States, 249 F.2d 576, 584 (8th Cir. 1957), cert. denied, 356 U.S. 921 (1958) (in trial of prominent Democratic politicians, concealment by jurors of their Republican affiliations and activities on behalf of GOP by family members); Ninth Circuit: United States v. Kraude, 467 F.2d 37, 40-41 (9th Cir.), cert. denied, 409 U.S. 1076 (1972) (concealment of juror's prior employment by the United States Government, including local office of the Department of Justice); Jackson v. United States, 408 F.2d 306, 308-09 (9th Cir. 1969) (failure to disclose juror's recognition of having had previous contact with one of the defendants); Marshall v. United States, supra, 355 F.2d at 1008-10 (failure by juror to acknowledge in response to inquiry whether he was or had ever been employed as law enforcement officer that he carried special police officer's badge); Cavness v. United States, supra, 187 F.2d at 722-23 (juror's status as reserve police officer not mentioned on voir dire); Tenth Circuit: Williams v. United States, 418 F.2d 372, 376-77 (10th Cir. 1969) (failure to disclose in bank robbery trial that juror's employer, supermarket chain, had recently been victim of robbery); Welch v. United States, 371 F.2d 287, 294 (10th Cir.), cert. denied, 385 U.S. 957 (1966) (in trial of Justice of Oklahoma Supreme Court, juror's failure to reveal in response to question whether any near relatives had been "involved" in litigation reviewed by Supreme Court of Oklahoma that her father had been disbarred by order of that court); Brown v. United States, supra, 356 F.2d at 232-33 (juror's non-disclosure in murder prosecution of her brother having been a homicide victim in response to query whether jurors or immediate family members had ever been victim of attack upon their person); Deschenes v. United States, 224 F.2d 688, 690-91 (10th Cir. 1955) (asked about peace officer status, jury foreman did not mention his membership on Wichita, Kansas Crime Commission); D.C. Circuit: Turner v. United States, supra, 416 F.2d at 817 (asked if any member of jury panel had ever been robbed, juror did not mention that his family residence had been burglarized); United States v. Baker, supra, 266 F. Supp. at 462-63 (non-disclosure of juror's position as Lieutenant in D.C. Police Reserve).

Apparently aware of the substantial failure to buttress this motion with real rather than imagined demonstration of bias by juror Stephenson resulting in prejudice to the defense, it is suggested that the relief requested should be granted solely because Ms. Stephenson's conduct "deprived defense counsel of his right to intelligently exercise peremptory challenges under Rule 24(b)." Defendant's Memorandum of Law in Support of Motion to Set Aside Verdict, p.2. However, the law is squarely to the contrary.

In nearly all of the decisions concerning supposed juror misconduct on the *voir dire* previously cited, the "impaired peremptory challenge" argument suggested here was expressly advanced in support of the unsuccessful new trial requests. *E.g.*, *United States* v. *Shahane*, *supra*, 517 F.2d at 1179; *United States* v. *Robbins*, *supra*, 500 F.2d at 653 n.6; *Williams* v. *United States*, *supra*, 418 F.2d at 377; *Marshall* v. *United States*, *supra*, 355 F. 2d at 1008; *DeRosier* v. *United States*, *supra*, 407 F.2d at 962-63; *United States* v. *Provenzano*, *supra*, 240 F. Supp at 410. The *sine qua non* for relief from verdict is a proper demonstration, not mere supposition, that the defendant was prejudiced because a particular individual was a member of the jury. *See United States* v. *Robbins*, *supra*, 500 F.2d at 653 n.6. Hypothesized bias and retrospective assertion that a peremptory challenge would have been exercised, standing alone, are insufficient to overturn the finality with which the jury presumptively speaks when returning a guilty verdict. As the Tenth Circuit observed in *Williams* v. *United States*, *supra*, 418 F.2d at 377:

> "In the absence of a showing of actual bias or an intentional withholding of the facts, there is little in the record from which the court can conclusively presume that the non-disclosure was obvious disqualification and inherent prejudice as a matter of law. Whether juror Dillon had any preconceived enmity, prejudice, or bias against defendant is a matter of supposition. The fact that juror Dillon might have been peremptorily challenged by defendant is not alone sufficient to reverse defendant's conviction. Defendant is entitled to a fair trial, but not a perfect trial."

Ignoring totally Eury and the large number of other decisions cited above demonstrating that the decisional law clearly fails to support the ruling which he seeks from this Court, in his moving memorandum defendant instead incorrectly invokes two cases -- Jackson v. United States, 395 F.2d 615 (D.C. Cir. 1968) and United States ex rel. DeVita v. McCorkle, 248 F.2d 1 (3d Cir.) cert. denied, 355 U.S. 873 (1957) -- as supposed precedent for the relief requested on this motion. Although those cases nominally did award new trials where jurors had omitted information probative of possible bias on voir dire, those decisions and their factual underpinnings are plainly distinguishable from the circumstances and issues presented by this motion. Furthermore, the Second Circuit not only has explicitly recognized the sui generis nature of Jackson and DeVita and that those decisions must be interpreted as limited to their peculiar factual complexions, but even with that caveat has expressed serious reservations about endorsing the reasoning and results therein. See Mikus v. United States, supra, 433 F.2d at 723.*

In Jackson, a murder prosecution, one of the jurors was discovered after the trial to have had a recent life experience -- involvement in a love triangle -- which precisely paralleled circumstances of the homicide proved at trial. Even though there was no specific inquiry of the juror concerning this rather unique experience, the Court of Appeals nonetheless concluded, relying on DeVita, that because the defendant was charged with a capital offense the juror's presence on the jury violated Jackson's Sixth Amendment right to a trial by impartial jury.

DeVita involved a similar striking parallel between the facts of the crime on trial -- a felony murder committed in the course of an armed robbery -- and the experience of one juror who himself had been robbed on the same street on which the crime on trial had occurred on his way, like the murder victim, to make a night deposit at a branch of the National State Bank, within seven months' time of the murder.

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* The Second Circuit is not alone in its criticism of the jurisprudential approach taken in DeVita and Jackson. Professor Moore characterizes the result in Jackson as "ridiculous" but for the fact that it was a murder case. 8A Moore, Federal Practice ¶ 24.03 at p. 24-30 n.10.

In response to specific inquiry this juror concealed both the fact of his having been so robbed as well as his acquaintance with members of the police squad which had investigated the robbery-murder, keeping his silence throughout the examination and excuse of other talesmen who revealed associations with the crime of lesser parallel than his own. Moreover, the prosecution was conducted in a fashion which brought the juror's own similar experience vividly to the forefront of his mind throughout the trial and, later, during the jury's deliberations. In a split (4 to 3) en banc decision, the Third Circuit directed a new trial, remarking that the closeness of the juror's connection with the trial content was "frightening" and concluded that since "possible deprivation of human life" was at stake* extraordinary scrutiny of the proceedings for fairness was warranted. 248 F.2d at 9. In doing so, the juror's concealment of the certain deja vu nature of his service in the case was ruled to be "a weighty prejudicial occurrence ... which cried out for correction...." Id.

Of course, Ms. Stephenson had no connection with the trial content in this case, least of all a frightening one. Nor, as demonstrated earlier, do the Second or other

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* As a practical matter, the only question to be resolved by the trial jury in DeVita was the question of whether the defendants were to receive a life sentence or to be executed. See 248 F.2d at 8-9.

Circuits which have had occasion to consider the issue construe as a "weighty prejudical occurrence" non-disclosure of an experience so far removed from the issues which were tried herein as a prior arrest which never proceeded past arraignment.

So too, Clark v. United States, 289 U.S. 1 (1933) and United States v. Lampkin, 66 F.Supp. 821 (S.D. Fla. 1946), cited by Mulligan as authorizing the grant of a new trial, are inapposite. Both of those cases were criminal contempt prosecutions of jurors arising out of their conduct on the voir dire. Manifestly, for the same reasons explicated earlier in this memorandum that juror Stephenson did not perjure herself on the voir dire (see A., infra), she cannot be found to have committed an act of criminal contempt by failing to volunteer the circumstances of the Scelza incident in reply to the Court's "involvement" inquiry. And in any event, the strong policy forbidding post-verdict investigation into the jury's deliberations attendant upon "the right of the jury in its impartiality to be independent," United States v. Robbins, supra, 500 F.2d at 654, is not to be overriden to award a convicted defendant a new trial merely because of a completely unsupported claim that a juror misconducted herself in a contumacious fashion.

When all is said and done, what remains of defendant's motion is to lay it bare for what it really is -- a last ditch effort to rescue Mulligan from the inevitable consequence of the jury's unanimous rejection of his protestation of innocence on which his plea of not guilty was premised and through which his right to trial by a jury of his peers was vindicated. The pendulum of justice having decisively swung away from the presumption of innocence when the jury of twelve announced their verdict on June 20th, Mulligan's repeated efforts to tarnish the diligence and attention with which the jurors discharged their responsibilities fall far short of the level required to overcome "the strong public interest in the integrity of jury verdicts and the protection of jurors from harassment." United States v. Green, 523 F.2d 229, 235 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976). Suspicion, speculation, guesswork, surmise, hindsight and even a background investigation into the personal life of at least one member of the jury* have all failed to do more than spin chimerical doubts regarding Mulligan's conviction of making a false material declaration before a United States Grand Jury "so amply justified by the evidence in the record." See United States v. Allied Stevedoring Corp., 258

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* Such investigations are disfavored by the courts. See, e.g., United States v. Brasco, 516 F.2d 816, 819 n.4 (2d Cir.), cert. denied, 423 U.S. 860 (1975); United States v. Miller, 403 F.2d 77, 81-84 (2d Cir. 1968); Sinclair v. United States, 297 U.S. 749 (1929).

F.2d 104, 106 (2d Cir.), cert denied, 358 U.S.841 (1958). Though Mulligan opines he was denied a fair trial, there is nothing to support his obviously skewed vision.

> "That a juror might not have been impartial, is indeed, a possibility. But, when we venture into speculation over thoughts or attitudes not manifest, there is always the chance that any jury empanelled to try a case may include an individual whose prejudices have not been revealed." United States v. Colabella, 448 F.2d 1299, 1302 (2d Cir. 1971), cert. denied, 405 U.S. 929 (1972).

Invocation of the defendant's speculated retrospective concept of fairness in a trial which ends in his conviction "would result in unwarranted reversals of perfectly fair jury verdicts and would inject an unjustifiable degree of instability into the jury system." Fritz v. Boland & Cornelius, 287 F.2d 84, 86 (2d Cir. 1961). Were the rule otherwise and a conviction subject to upset for unsubstantiated, unspecific protestations of juror bias, the institution of jury trial would surely collapse. Jorgensen v. York Ice Machinery Corp., 160 F.2d 432, 435 (2d Cir. 1947). See also United States v. Haynes, supra, 398 F.2d at 985; Brown v. United States, supra, 356 F.2d at 233.

CONCLUSION

The motion to set aside the jury verdict and for a new trial should be summarily denied.

Dated: New York, New York
August 11, 1977

Respectfully submitted,

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- Of Counsel -

ADDENDUM

New York Civil Rights Law

"§ 79-e Return of fingerprints, palmprints and photographs.

Upon the determination of a criminal action or proceeding against a person, in favor of such person, unless another criminal action or proceeding is pending against him or unless such person has previously been convicted in this state of a crime or of the violation of loitering, as defined in subdivision three of section 240.35 of the penal law or has previously been convicted elsewhere of any offense which would be deemed a crime or the violation of loitering, as defined in subdivision three of section 240.35 of the penal law if committed within the state, every photograph of such person and photographic plate or proof, palmprints and fingerprints taken or made of such person while such action or proceeding is pending by direction or authority of any police officer, peace officer, or any member of any police department and all duplicates and copies thereof shall be returned on demand to such person or his representative, duly authorized in writing, who is an attorney admitted to practice law in New York State, by the police officer, peace officer or member of any police department having any such photograph, photographic plate or proof copy or duplicate in his possession or under his control; and such police officer, peace officer or member of any police department failing to comply with the requirements hereof, shall be guilty of a misdemeanor."

New York Criminal Procedure Law

"§ 160.50 Order upon termination of criminal action in favor of the accused.

1. Upon the termination of a criminal action or proceeding against a person in favor of such person, as defined in subdivision two of this section, unless another criminal action or proceeding is pending against such person, or unless the district attorney upon motion with not less than five days notice to such person or his attorney demonstrates to the satisfaction of the court that the interests of justice require otherwise, the court wherein such criminal action or proceeding was terminated shall enter an order, which shall immediately be served by the clerk of the court upon the commissioner of the division of criminal justice services and upon the heads of all police departments and other law enforcement agencies having copies thereof, directing that:

(a) every photograph of such person and photographic plate or proof, and all palmprints and fingerprints taken or made of such person pursuant to the provisions of this article in regard to the action or proceeding terminated, and all duplicates and copies thereof, shall forthwith be returned to such person, or to the attorney who represented him at the time of the termination of the action or proceeding, at the address given by such person or attorney during the action or proceeding, by the divison of criminal justice services and by any police department or law enforcement agency having any such photograph, photographic plate or proof, palmprint or fingerprints in its possession or under its control;

(b) any police department or law enforcement agency including the division of criminal justice services, which transmitted or otherwise forwarded to any agency of the United States or of any other state or of any other jurisdiction outside the state of New York copies of any such photographs, photographic plates or proofs, palmprints and fingerprints shall forthwith formally request in writing that all such copies be returned to the police department or law enforcement agency which transmitted or forwarded them, and upon such return such department or agency shall return them as provided herein;

(c) all official records and papers other than court decisions relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office be sealed and not made available to any person or public or private agency; and

(d) such records shall be made available to the person accused or to such person's designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (ii) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license.

2. For the purposes of subdivision one of this section, a criminal action or proceeding against a person shall be considered terminated in favor of such person where:

(a) an order dismissing the accusatory instrument pursuant to article four hundred seventy was entered; or

(b) an order to dismiss the accusatory instrument pursuant to section 170.30, 170.50, 170.55, 170.56, 210.20, or 210.46 of this chapter was entered and the people have not appealed from such order or the determination of an appeal or appeals by the people from such order has been against the people; or

(c) a verdict of complete acquittal was made pursuant to section 330.10 of this chapter; or

(d) a trial order of dismissal pursuant to section 290.10 or 360.40 of this chapter was entered and the people have not appealed from such order or the determination of an appeal or appeals by the people from such order has been against the people; or

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

S 76 Cr. 988
(RO)

DENNIS W. MULLIGAN,

Defendant.

DEFENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO SET ASIDE VERDICT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

S 76 Cr. 988
(RO)

DENNIS W. MULLIGAN,

Defendant.

DEFENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO SET ASIDE VERDICT

The government's memorandum in opposition to defendant Mulligan's motion to set aside the verdict in this case is in all likelihood one of the most blatantly dishonest documents ever filed in this Court.

In a flailing attack, assistant United States Attorney Block condemned even this Court for the "ambiguity" and "imprecise phraseology" of its question, "Have you ever been involved in a criminal proceeding?" (Government's memo at 6). Defense counsel is assailed for daring to expect that a juror who had been charged with a violent felony assault would respond affirmatively to such a question (See e.g., Government's memo at 7). The status of being a defendant in a criminal proceeding is portrayed as an elusive "phrase of art," so "technical" in meaning that no layman can be expected to understand it (Government's memo at 4, 12). Cases are distorted and facts are misrepresented. Indeed, the prosecutor even suggests that we should feel sympathy for this poor juror who suffered the tribulations of being arrested and booked, having to hire a lawyer, being forced to appear in court and testify, and having a monetary judgment entered against her, all because the "bad neighborliness" of the post office forced her to stab a postal employee in the back of the head. Apparently, the prosecutor feels that the reprehensible manner in which the criminal justice system treated Ms. Stephenson somehow excuses her perjury before this Court.

The absurdity of Mr. Block's arguments serves only to highlight the validity of defendant's application. Despite the prosecutor's verbosity, the dispositive facts are simple and beyond any serious dispute. Ms. Stephenson perjured herself repeatedly during the voir dire on matters of critical importance to this case. Her concealment of information substantially prejudiced the defendant, denying him both his right to challenge her as a juror and his right to a fair trial by an impartial jury. Consequently, the jury's verdict must be set aside.

A. Juror Stephenson repeatedly perjured herself during the voir dire.

It should be noted at the outset of this section that proof of knowing perjury is not essential to defendant's application, as the government itself apparently concedes (Government's memo at 14) see, e.g., *Jackson* v. *United States,* 395 F.2d 615 (D.C.Cir.,1968). Regardless of whether this juror's concealment was knowing or somehow inadvertent, the information which has now been disclosed about her assaultive behavior, the felony charges leveled against her, her booking and overnight incarceration by New York City Police officers, the civil judgment which was entered against her, her history of psychiatric treatment, her unnatural endearment to the prosecutor and his witness in this case, and her expressed hopes of gaining literary fame through writing a book on bank robberies in collaboration with that prosecutor all establish that the defendant was substantially prejudiced by her presence on the jury (see Point B, infra). However, given the facts conceded by Mr. Block in his affidavit (hereafter "Block affidavit") it is also clear, despite the prosecutor's artful machinations, that Ms. Stephenson did knowingly perjure herself, not once, but several times during the voir dire in this case.

A1. "Have you ever been involved in a criminal proceeding?"

The government concedes that Ms. Stephenson was charged with a violent felony, was arrested and booked, spent a night in jail, hired a lawyer and appeared in court on those charges (Block affidavit). Moreover, the government does not claim that Ms. Stephenson forgot those events. Rather, it attempts to argue that despite those proceedings, Ms. Stephenson somehow did not regard herself as ever having been "involved in a criminal proceeding." The government's position is nothing short of ludicrous.

On no less than four occasions during the voir dire, this Court explained in the presence of the jury panel, including Ms. Stephenson, that anyone who had "ever been involved" in "any kind of a criminal case" as a "defendant" should answer this question affirmatively (10, 17, 24-5, 35).[1] In addition, the judge referred back to this definition on at least six more occasions (28, 63, 65, 67, 84, 97). Thus, there could have been no question in Ms. Stephenson's mind that anyone who had ever been a defendant in a criminal proceeding should so indicate in response to this question.

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1. Numbers in parentheses refer to pages of the transcript of the voir dire on June 7, 1977.

"The status of 'being a defendant in a criminal case' is a phrase of art" the government retorts, one which is not "well-defined" for laymen. (Government's memo at 4). The government's position must be rejected for several reasons. First, Ms. Stephenson is a college-educated person, who was planning on writing a book on the criminal justice system, and who could therefore reasonably be expected to know that a person who has been charged with a crime has been a "defendant" and "involved in a criminal proceeding" even if that charge was eventually dismissed. Moreover, the documents relating to the criminal proceedings against Ms. Stephenson, many of which she obviously observed, repeatedly referred to her as the "defendant." (See Block affidavit at Exhibit B - "Complainant stated that the above defendant (listed as "Stephenson, Ginger A.") did strike him ...; Exhibit C - "The People of the State of New York vs. Ginger Stephenson, Defendant"; Exhibit D - "...the defendant Ginger Stephenson ... Deponent states ... that the defendant did with an unknown object strike one Joseph Scelza ..."; Exhibit E - "The People of the State of New York vs. Ginger Stephenson ...Defendants are charged with a violation of P.L. 120.05 Assault"; Exhibit F - "The People of the State of New York vs. Virginia Stephenson, defendant": Exhibit H - "The People of the State of New York vs. Ginger Stephenson, Defendant"; Exhibit L - "Defendant's last name Stephenson first Ginny." Moreover, Ms. Stephenson was present in court for proceedings in her case on November 16, 1973 and November 27, 1973 when she was repeatedly referred to by her own attorney and the court as "defendant". (Transcripts of these proceedings are attached to Block affidavit as exhibits C and H). It is therefore impossible that this juror did not know that she had been a defendant in a criminal proceeding.

The government's only other argument on this issue is that even if Ms. Stephenson had known that she was once a defendant, she answered "no" to the voir dire question on the basis of CPL 160.60 (Government's memo at 9-14). It is disengenuous at best for the government to argue on the one hand that a "layman" such as Ms. Stephenson would not know the meaning of the term "defendant" but that on the other hand she *would* know the contents of a New York Criminal Procedure Law provision. The legal answer to the government's claim is that this New York provision does not apply here because the inquiry as to Ms. Stephenson's criminal involvement was coming from a "superior court." CPL 160.60. The practical answer, however, is that any doubts Ms. Stephenson may have entertained as to whether she had been "involved in a criminal proceeding" or whether she was required to admit that fact in response to this Court's inquiry were conclusively resolved during the *voir dire* of the prospective juror immediately preceding her. When that juror was asked about his involvement in criminal proceedings, he answered that he had been a defendant in two criminal proceedings, but explained that *neither of those proceedings had resulted in a conviction*. (103). This Court, rather than informing that prospective juror that dismissed charges were irrelevant, indicated the importance of his answer by calling the prospective juror into chambers for further questioning (103). Thus, there could have been no possible doubt in Ms. Stephenson's mind that she was expected to disclose her involvement in criminal proceedings in response to this Court's inquiry. Her denial was clearly perjurious.

A2. "Have [you had] any disputes with the United States?"

When Ms. Stephenson was asked this question, she likewise answered in the negative (111). As explained in the affidavit of Paul A. Goldberger, Esq., submitted with the original application to set aside the verdict, this answer was also perjurious. Ms. Stephenson had assaulted a United States Postal Employee during an argument (first dispute), was formally charged with that assault (second dispute) and was sued civilly by him (third dispute). Since the government does not dispute this claim of perjury in their answering memorandum, the defense will rest on its original papers on this issue.

A3. "Have you ever been the victim of a crime?"

Ms. Stephenson herself claimed that she had not assaulted the postal employee, but rather that he had assaulted her. Indeed, she sought to bring criminal charges against him on that basis (Block affidavit, Exhibit H at 2-3), cross-claimed against him civilly, and testified in the civil proceeding that Scelza had punched her in the stomach (Block affidavit, Exhibit W at 2). Although the civil court disbelieved her testimony, it is clear that Ms. Stephenson was claiming in those sworn statements that she was the victim of an assaultive crime against her. If that was her honest belief, then she perjured herself when she denied to this Court that she had ever been the victim of a crime.

In conclusion on this point, it is somewhat ironic that Mr. Block should go to such lengths to defend the obvious perjury of this juror so as to sustain the perjury conviction of the defendant in this case. In the face of the overwhelming evidence of Ms. Stephenson's false statements, the circumstantial evidence of defendant's alleged perjury appears weak indeed. If conditions were different, and this juror had convinced the rest of the jury to acquit rather than convict, there can be little question that Mr. Block would be seeking a perjury indictment against Ms. Stephenson, and that she would be convicted of that charge. For this Court to become a willing participant in such one-sided justice by denying this application would be unconscionable.

B. The defendant was substantially prejudiced by Ms. Stephenson's perjury and her presence on the jury.

Mr. Block's arguments on prejudice are even more deceptive than his arguments on perjury. Even with the help of a computer, this prosecutor is unable, or unwilling, to be accurate. Before this Court becomes unduly impressed with the government's electronically-produced string cites, it should examine those cases to determine whether they actually say what Mr. Block claims they say. In fact, they do not.

Although it will take more than the few days alloted to the defense to provide a full response to what Mr. Block and his computer had over a month to produce, a brief examination of his arguments and purported citational support suffice to reveal the dishonesty of his position. Thus, at the outset of his argument, this prosecutor makes the blanket assertion that "when a new trial is sought on the ground that a prospective juror failed to disclose material information during examination as to his qualifications, it is the defense burden satisfactorily to establish that 'the juror deliberately attempted to deceive the Court by intentionally concealing facts reasonably called for by a question and that the defendant was prejudiced thereby.'" (Government's memo at 5).

The quote is artfully extracted from a district court holding from another circuit which in context does not say that proof of knowing perjury is always necessary, and in any event is not binding on this Court. Rather, this issue is controlled by this Court's decision in Jackson v. United States, supra, which says that evidence of possible bias by a juror is sufficient to establish a violation of the defendant's Sixth Amendment right to a trial by an impartial jury, even absent any evidence that that juror perjured himself in voir dire. Here, therefore, Ms. Stephenson's obvious perjury - her intentional effort to hide from the Court and defense counsel certain information about her past - is cited by the defense not because it is requisite to impeaching the jury's verdict, but rather because it establishes the extent of this juror's bias and her incompetency to serve on this jury.

Next, in a superficially impressive list of string citations, Mr. Block attempts to convince this Court that the intentional concealment of highly relevant information by a juror during voir dire somehow does not affect the defendant's right to a fair trial by an impartial jury. In fact, the actual holdings of these cases are substantially different from what Mr. Block would have this Court believe them to be. Thus, the prosecutor portrays United States v. Eury, 268 F.2d 517 (2d Cir.1959) as a case against a building contractor in which a juror concealed the fact that she had lost "a considerable sum in business dealings with a contractor who was also her brother-in-law." (Government's memo at 18). The government neglects to point out that the court regarded as dispositive the fact that that juror, at a subsequent hearing, explained that those losses were so inapposite that she had not even thought of them during the voir dire. The government here does not, and could not, pretend that Ms. Stephenson had similarly forgotten about her felony assault arrest and proceedings. Mr. Block similarly portrays United States v. Wyman, 510 F.2d 1020 (5th Cir.,1975) as a case in which the juror concealed his social and business dealings with the defendant (Government's memo at 20). Mr. Block neglects to say that there was no evidence that the juror had ever had any social or business dealings with the defendant. Rather, only the juror's employer had had such dealings, and there was no evidence that the juror recognized the defendant or made any connection between the defendant and his employer. Id. 510 F.2d at 1023). Marshall v. United States, 355 F.2d 999 (9th Cir.,1966) is portrayed by Mr. Block as a case in which a juror concealed the fact that he was a special police officer. (Government's memo at 21). In fact, the juror was in charge of badminton for the Parks Department, and had been given a badge for identification and to help him in driving undesirables away from the park. Mr. Block describes Williams v. United States, 418 F.2d 372 (10th Cir.,1969) as a case involving a juror's "failure to disclose in bank robbery trial that juror's employer, supermarket chain, had recently been victim of robbery" (Government's memo at 21-22). Again, Mr. Block neglects to disclose the dispositive fact - that the court found no evidence that the juror even knew that one of his employer's stores had been robbed. Finally, Mr. Block would have this Court believe that Deschener v. United States, 224 F.2d 688 (10th Cir.,1955) was a case in which a juror intentionally concealed the fact that he was a peace officer in response to a direct question. In fact, when asked that question, the juror had stated that he had been employed as a guard in a penal institution and the defense did not challenge him. In light of that, the juror's inadvertent failure to state that he was also the member of a volunteer citizens group called the Wichita, Kansas Crime Commission was irrelevant and non-prejudicial.

The compulsion of Mr. Block or his computer to distort the holdings of these cases serves only to demonstrate the lengths to which this prosecutor is willing to go to deny the defendant the fair hearing by an impartial jury to which he is constitutionally entitled. However, even the flurry of rhetoric Mr. Block generates cannot disguise the dispositive facts as to prejudice. This juror intentionally perjured herself during voir dire so as to conceal the fact that she had been previously charged with a violent felony for stabbing a postal employee in the back of the head. She was arrested by a member of the same police department as the defendant in this case (Government's memo at 19), booked in one of that police department's precincts (Block affidavit, Exhibit B) and held overnight in one of that department's detention facilities (Block affidavit, Exhibit B). She dishonestly filed a cross-claim in the subsequent civil suit and perjured herself in sworn testimony in that case, claiming that the postal employee she had stabbed had in fact punched her in the stomach (Block affidavit, Exhibit W). The civil court judge, apparently more adept at recognizing perjury than the prosecutor in this case, rejected her testimony and entered judgment finding her guilty of assault.

Ms. Stephenson's determination to get on this jury, even at the cost of perjuring herself in voir dire is evident from her post-trial letter to prosecutor Block:

> What happened to me as a juror was totally unexpected -- from the first gasp of surprise at being chosen, the exhileration of the trial itself, the agony of deliberation, my tremulous talk with Agent Walker immediately following the trial, to the final moments in your office.

Her unnatural infatuation with the prosecutor and the others on the prosecutorial team is also evident:

> I owe you a great debt of gratitude, Ira Block. A debt to be shared in part with Agent Walker, Mike Rocke, Judge Owen, even my fellow jurors and yes, "my character," Frank Smith. But it is you who stand out in greatness.

The prosecutor cannot seriously dispute the role that this juror's prejudices played in the verdict. As the government itself apparently concedes, it was this juror and this juror alone who eventually compelled the rest of the jury panel to convict on the single perjury count, a victory she proudly boasts in her letter:

> I believed with all my heart that I was right, despite the fact that eleven other people said I was wrong.

That her zealous pursuit of conviction was improperly affected by her infatuation for Mr. Block is also evident from her letter. Referring to the fact that she met with Block for two hours immediately after the verdict, she wrote:

> I wish I could have spoken to you more extensively at that time. But the circumstances were not unlike being in the "inner office" of a candidate whom you've worked for and believed (sic) in, at the moment of victory. There is little time to say much to those immediately surrounding the candidate -- but the thrill of just being there defied description. Thank you for letting me share in your "victory." I just hope you meant it when you said you were happy with our one count of purjury.
>
> I, of course, wish your victory had been complete. I wish we could have convicted on all counts. But Ira (I hope you don't mind my calling you Ira. I do feel rather close to you after all this)...You succeeded in doing something that five years of analysis with a brilliant doctor could not do.

Finally, her letter establishes that, rather than fulfilling her duty to weigh the evidence and determine guilt or innocence, this juror was obsessed with herself:

> As I told you, the weekend before our final deliberations on Monday, I literally descended into hell. I dredged up five years of analysis and then some. I went through a complete cartharsis of the soul.

and obsessed with the possibility of financial gain from this conviction:

> I'm writing again! Eagerly. Avidly. With enthusiasm! I am deeply involved in a project I firmly believe (sic) in (my Frank Smith book). Thank you, Ira Block -- that's a heck of a birthday present!
>
> Remember when I spoke to you the Friday following the trial? You said you'd speak to Smith's attorney the next week...But Ira, we've got one hell of a book!

In the face of this evidence, the government had the temerity to claim that the defendant's "right to a trial by a jury of his peers was vindicated." Even Ms. Stephenson admits that immediately after the guilty verdict was rendered, four jurors wanted to change their votes

(Stephenson letter at 2).

In the end, all of the disparaging adjectives and rhetoric Mr. Block can muster cannot hide the fact that the last thing the defendant got in this case was a fair trial by an impartial jury. If, like the prosecutor, this Court is only concerned with conviction, then the denial of fair trial rights can be overlooked and the defendant's application denied. But, if this Court is determined to preserve a constitutional system of criminal justice, then the verdict must be set aside until such time as a trial by a properly constituted jury can be held.

CONCLUSION

FOR THE ABOVE STATED REASONS AND THE REASONS STATED IN THE ORIGINAL APPLICATION, THE VERDICT SHOULD BE SET ASIDE

Respectfully submitted,

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Defendant

EDWARD W. HAYES, ESQ.
MICHAEL YOUNG, ESQ.
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

DENNIS W. MULLIGAN,

Defendant.

NOTICE OF MOTION

S76 Cr. 988
(R.O.)

SIRS:

PLEASE TAKE NOTICE that, pursuant to the annexed affidavit of PAUL A. GOLDBERGER, attorney for the defendant, Dennis W. Mulligan the undersigned will move this Court on September 6, 1977 at the United States Courthouse, Foley Square, New York, N. Y., at 9:30 a.m., or as soon thereafter as counsel can be heard for an order reopening the hearing on defendant's motion to set aside the jury verdict in the above case on the ground that one of the jurors concealed prejudicial information during the jury voir dire.

Yours, etc.,

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Defendant
401 Broadway Suite 306
New York, N. Y. 10013

Dated: New York, N. Y.
August 30, 1977

TO: HON. RAYMOND F. BURGHARDT
Clerk, United States District Court
Southern District of New York

HON. ROBERT B. FISKE, JR.
United States Attorney
Southern District of New York
Att: Ira Block

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

DENNIS W. MULLIGAN,

Defendant.

AFFIDAVIT

S76 Cr.988
(R.O.)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PAUL A. GOLDBERGER, being duly sworn, deposes and says:

I am the attorney for DENNIS MULLIGAN, a defendant in the above-captioned proceeding. I make this affidavit in support of defendant Mulligan's motion to set aside the verdict on the ground that one of the jurors concealed prejudicial information during the jury voir dire.

The information contained in this affidavit is based on conversations I have had with Robert Dobrich, Esq., and the prior proceedings herein.

At the hearing conducted in chambers by this Court with juror Stephenson on August 18, 1977, Ms. Stephenson stated under oath that she had been advised by her attorney, Robert Dobrich, after the felony assault charges against her were dismissed, that if she was ever asked if she had been involved in a criminal case or if she had ever been arrested, she should say "no" (transcript of August 18, 1977 at 46). She also testified that she asked Mr. Dobrich "specifically" about how her arrest would affect her if she was called for jury duty, and that he again told her to answer "no". (Id. at 47-8).

I have spoken to Mr. Dobrich and have read these portions of the hearing transcript to him. He has advised me that he never gave Ms. Stephenson such advice. Thus, Ms. Stephenson's answers to this Court's questions at the hearing, like her answers to this Court's questions in the voir dire, were false. This Court, in denying defendant's motion to set aside the verdict, stated that it found that Ms. Stephenson had not perjured herself at the voir dire when she denied any prior involvement in criminal proceedings because that answer was made pursuant to "the advice of her counsel." It is now clear that Mr. Stephenson's answers in the voir dire were not based on the advice of counsel, and this Court's finding to that effect is in error. (Id. at 57).

WHEREFORE, the hearing on juror Stephenson should be reopened and the motion to set aside the verdict should be granted.

PAUL A. GOLDBERGER

Sworn to before me this
day of , 1977.

NOTARY PUBLIC

EJC-1 September 3, 1976 Dennis Mulligan

[after ejc] Re: John Doe

Reg. Jury Mr. Fortuin

DENNIS MULLIGAN, called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. FORTUIN:

Q Would you state your name, please, and spell it.

A Dennis Mulligan [spells].

Q Where do you reside? A 352 East 89th Street.

Q Mr. Mulligan, my name is Tom Fortuin. I'm an Assistant United States Attorney. This is a United States Grand Jury. The Grand Jury is investigating violations of the federal law - specifically violations of Section 371 of Title 18 of the United States Code, which relates to conspiracies either to defraud the United States Government or conspiracies to violate other statutes of the United States; conspiracy is merely an agreement to violate any law, any other law. It's also investigating violations of Section 2113 of Title 18 of the United States Code, which relates to bank robbery. As a practical matter, the Grand Jury has the power to indict someone for any violation of the federal law if it finds probable cause to believe that a crime has been committed in the Southern District of New York, a federal crime. I advise you that you are a target of that investigation. That means that, as a consequence of the Jury's deliberations, you could be indicted. Do you understand that? A Yes sir, I do.

Q As a consequence of the fact that you are a target, you have certain rights, and I wish to explain them to you at this time. You have a right to refuse to answer any questions that I ask on the grounds that a truthful answer ot that question might tend to incriminate you. Do you understand that? A Yes sir.

Q Do you understand that anything you say here can be used against you in a court of law? A Yes sir.

Q Now, you have a right to consult with an attorney, and although the attorney could not be present in the Grand Jury room, you could have him outside to speak with, and you could leave the room and consult with him at any time you want. Do you understand that? A Yes, I do.

Q Now, have you had an opportunity to consult with an attorney? A Not yet, no sir.

Q But you do have an attorney outside that you've been -

A He's a personal friend of mine. I just got the subpoena at two o'clock this afternoon. This is like a bombshell - I don't know anything about this.

Q What's the name of the friend who's acting as your attorney? A Mr. John Scoffield.

Q As I understand it, you would like to have an adjournment so you'd have an opportunity to obtain your own lawyer and consult with him; is that right? A Yes sir, I would.

Q All right, I'm going to adjourn the subpoena until next Tuesday.

MR. FORTUIN: Mr. Foreman, would you direct the witness to appear here in the Grand Jury room at twelve o'clock next Tuesday.

FOREMAN: Yes. You are directed to appear here in this Grand Jury room at twelve o'clock next Tuesday.

WITNESS: Yes sir. Thank you. Thank you.

FOREMAN: You're excused.

WITNESS: Oh. Thanks - I'm sorry.

[WITNESS EXCUSED]

USA 33s - 475
(ED. 4-23-71)

GOVERNMENT
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
40 id

UNITED STATES GRAND JURY

SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA

-v-

JOHN DOE

- -x

United States Courthouse
Foley Square
New York, New York

September 13, 1976
3:50 o'clock P.M.

APPEARANCES:

THOMAS FORTUIN, Esq.

Assistant United States Attorney

Linda Bederman,
Acting Grand Jury Reporter.

RALPH FINK & ASSOCIATES
Certified Stenotype Reporters
140 NASSAU STREET
NEW YORK, N. Y. 10038

REctor 2-5566

DENNIS MULLIGAN, called as a witness, having been first duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. FORTUIN:

Q Would you state your name, please, and spell it for the reporter?

A Dennis Mulligan, M-u-l-l-i-g-a-n.

Q Mr. Mulligan, where do you reside, in your New York address.

A 352 East 89th Street.

Q And I want to advise you that this Grand Jury is investigating violations of the federal law, specifically, violation of Section 371 of Title 18 of the United States Code, which relates to conspiracies to defraud the United States and conspiracies to violate other federal statutes.

It is also investigating violations of the bank robbery statutes, Section 2113 of Title 18 of the United States Code.

I want to advise you that you are a target of this Grand Jury investigation.

If the Grand Jury were to find probable cause that you had committed a crime in the Southern District of New York, you could be indicted for that; do you understand that?

A Yes, I do.

Q As a consequence of that, I want you to understand that you have a right to refuse to answer any question that I may ask on the grounds that a truthful answer to that question would tend to incriminate you; do you understand that?

A Yes, I do.

Q You should understand that anything you do say here can be used against you in a court of law; do you understand that?

A Yes, sir.

Q Now, you understand that you have a right to consult with an attorney; do you understand that?

A Yes, sir.

Q Now, he is not allowed in this room, but he is permitted to be outside this room.

Do you have an attorney?

A Yes, I do.

Q How many do you have?

A Two.

Q And what are their names?

A Richard Dienst.

Q That's D-i-e-n-s-t?

A Yes, and Barry Slotnick.

Q S-l-o-t-n-i-c-k; is that correct?

A Yes, sir.

Q And they're outside the Grand Jury room and you have consulted with them; is that correct?

A Yes, sir.

Q I want to advise you that any time you wish to consult with them further, you can have an adjournment and you can spend as much time as you like with them; do you understand that?

A Yes, sir.

Q Don't hesitate to request an adjournment if you feel you need one; do you understand that?

A Yes, sir.

Q You should also understand that the testimony is being taken down by a reporter, and it is under oath, and should you knowingly and purposely make a false answer before this grand jury, that would be the federal crime of perjury; do you understand that?

A Yes, I do.

Q Would you tell us by whom you are employed?

A New York City Police Department.

Q And what is your position with the Police Department?

A I am a detective in the homicide squad.

Q Now, can you tell us since 1970 where have you maintained bank accounts?

A I have no bank accounts myself.

I think that in Bankers Trust -- I'm not sure of the dates, but I think it would be Bankers Trust on 86th Street and Second Avenue, that was the last place I had a bank account, but now I have no bank account.

Q What do you do with your paycheck when you get paid?

A We live on it.

Q And how about your wife; does she have, to your knowledge, any bank accounts, either savings or checking or of any variety?

A She has five dollars in her savings account.

Q Where is that?

A In Emerson, New Jersey.

Q And do those two accounts represent all the accounts that you and your wife have had over the last six years?

A To the best of my knowledge, yes, sir.

Q How about your children? Do they have accounts?

A They might have small accounts, like on birthdays -- I have five children, and on birthdays my mother-in-law, she might buy a bond or something for them.

I don't know what they have, but it wouldn't be much money. It might be a hundred or something like that.

Q If they had those accounts, where would they be, to your knowledge?

A My mother-in-law would know that.

Q Now, do you have any debts?

A I have a loan with First National City.

Q Which branch?

A 72nd Street and Broadway.

Q Is that the only debt that you have over, let's say, $1,000?

A And I have with the pension, my pension bureau, the pension loan. I have a debt with them, and, in fact, I just put in for another loan.

Q And other than that --

A Well --

Q You have a mortgage, I believe; is that correct?

A Yes, sir.

Q And a mortgage.

Other than those, do you have any debts over, let's say, $1,000?

A I would say no, sir.

Q And when you received money, then, you keep it in cash; is that correct?

A No, I have no cash on hand, sir.

Q Do you have a checking -- you don't have a checking account?

A I don't have a checking account, no, sir.

Q When you receive cash, what do you ordinarily do with it?

A Well, my family lives on my paycheck.

Q Do you have any sort of income at the present other than your job?

A No, sir.

Q How about over the past -- since 1970 have you had any sort of income other than from your job as a Policeman?

A To the best of my knowledge, no, sir.

Q Do you have any stocks or bonds?

A No, sir.

~~Q Now, I want to show you some photographs and ask you if you recognize the people contained in the photographs.~~

~~I show you Grand Jury exhibit 2.~~

~~Do you recognize that man?~~

~~A Yes, sir, I do.~~

~~Q Who is that?~~

~~A That's my cousin Maureen's boyfriend.~~

~~His name is Joseph Gurney.~~

Q How did you meet Mr. Gurney?

A My cousin started going out with him about ten years ago, and my other cousin, John, took exception to it and he went into -- this man owned a restaurant and a bar on First Avenue, and they had a fight.

Q Were you present on that occasion?

A I wasn't present, but right after the fight my cousin hit him and ran, and this guy said he was going to get him, and he came to me to go down to talk to the guy, and I went down and I had a verbal argument with him.

Q Your cousin John came to you and you went down and spoke to Gurney; is that correct?

A Yes, sir.

Q And was anyone else present when you spoke to Gurney?

A My cousin John also came with us because we both lived at 352 East 89th Street, and he came there, and Gurney had his friends there, and I just held the kid and said, "You better not hurt him," and that's my knowledge of this guy.

Q That's the entire conversation you had on that occasion?

A Yes, sir.

Q Thereafter did you see Mr. Gurney again?

A I might have seen him at family functions, like a wake or a wedding, but that was all.

Q You are certain that you never had a conversation with Mr. Gurney other than what you described?

A I might have seen him at the wedding and nodded and said hi, but I don't think so.

Q Other than the conversation that you described and the time you saw him, perhaps at the wedding, did you see him or meet with him on any other occasions?

A Not that I know of, sir.

Q I want to show you a photo marked Grand Jury Exhibit 5.

Do you recognize that man?

A (Perusing) Not from this photo, sir, no.

His face is -- it's a common face, but I'm not sure.

Q Does the name John Sericani mean anything to you?

A No, sir.

Q How about Baba?

A No, sir.

Q I show you Grand Jury Exhibit 4.

Have you ever seen that man?

A No, sir, never.

Q You have never seen him?

A No, not at all.

Q I show you Grand Jury Exhibit 1.

Have you ever seen that man?

A No, sir.

Q You're certain of that?

A Positively.

Q Does the name Frank Smith mean anything to you?

A No, sir.

Q You are certain of that?

A Positive.

Q Does the name Martin Shannon mean anything to you?

A No, sir.

Q You are certain of that?

A Positive.

Q Now, I want to direct your attention to a period in December and November of 1971, and I show you what has been marked Grand Jury Exhibit 7, and I ask you, first of all, what is it?

A It's a memorandum book that belongs to me.

Q You made those entries in that book; is that correct?

A Yes, sir, I did.

Q And you made them in the course of your duties as a member of the Police Department; correct?

A Yes, sir.

Q Now, would you look at the memo for that date?

A This is November 28th, November 29, then I go on vacation until December 15 and December 16 and December 17.

Q And I take it that those memoranda accurately reflect your activities for the days in question; is that correct?

A Yes sir, I would say so.

Q I want you to focus on that vacation which lasted from what days?

A November 29 to December 13.

Q As you sit here, do you have any current recollection of that vacation?

A No, no, sir.

Q You don't recall what you did during that period of time?

A No, sir, I don't.

Q Do you know whether you left town or whether you stayed in New York?

A Jeez, I wouldn't know.

Q I show you what has been marked Grand Jury Exhibit 6, and I ask you if you can identify that.

A That would be a -- it's called a UF 28. It's when you go on vacation you have to fill one of these out, and that's what it is.

Q And that's one that you filled out; is that correct?

A Yes, sir, for the days that are in the memo book.

Q The vacation that we just talked about?

A Yes, sir.

Q And reading, does that refresh your recollection as to that vacation?

A Yes, sir, I imagine I was on vacation.

Q But does it indicate, does it refresh your recollection as to where you went?

A No,sir.

Q It does indicate, however, does it not, that you would be staying at your residence during the period of this vacation; is that correct?

A Yes, sir, that's what it states.

Q Having reviewed that, does that refresh your recollection as to what you did during the course of that vacation?

A No, sir.

Q And you have no current recollection now of what happened during those days you were on vacation?

A No, sir, I don't.

Q Now, prior to the time of that vacation, let's say November of 1971, what was your assignment at that time?

A I think I was assigned to the 20th squad.

Q That's the 20th detective squad?

A 20th detective squad, yes, sir.

Q And where were they located at that time?

A 160 West 68th Street.

Q That's moved now; is that correct?

A Yes, sir, now it's at 120 West 82nd Street.

Q And while you were there, did you have occasion to investigate bank robberies or other crimes that occurred outside of that particular precinct?

A I can't recall if we did or not.

Sometimes we were -- I just -- I don't know, it's not clear.

Q It was the practice of the Police Department at that time, was it not, to assign people from other precincts to cover adjacent precincts if there was a shortage of manpower?

A We would go on stakeouts.

Q So there were occasions when you would investigate crimes outside the precinct to which you were assigned; correct?

A That's possible, yes, sir.

Q Let me ask you this: are you familiar with a bar by the name of the Welcome Bar?

A No, sir, not at all.

Q Have you ever been there?

A No, sir, not at all.

Could you tell me where it's located?

Q Yes, I'm trying to locate that.

28th Street and Sixth Avenue.

A I'd say no, sir.

Q You have no recollection of visiting that bar?

A No, sir, not at all.

Q Now, are you familiar with the area of New York Hospital in New York City; in other words, around York Avenue and 70th Street?

A Yes, sir, I would be.

Q Did you ever participate in the investigation of a bank robbery in that vicinity?

A I think I was there on a stakeout at one time.

Q And do you recall approximately when that would be?

A Oh, no. That's many years ago.

I have no idea when it would be, but --

Q How was it that you got there on a stakeout?

A I was assigned, I guess it would be by the district commander, the captain that would be in charge of the four precincts.

He would assign us.

Q How is it that you would have a stakeout on the bank?

A Well, they had information that the bank was going to be stuck up, and they would put plainclothes detectives there.

Q And do you recall that?

A I recall that I was downstairs in the bank and the -- there was lots of detectives there, and they made an arrest upstairs.

There was a car going around the block, and somebody sighted somebody with a shotgun, and arrests were made and we didn't stay long.

Q But you recall that that is a bank branch downstairs; is that correct; it's not on the street level?

A Yes, sir.

Q And there is a tunnel connecting it to parts of New York Hospital?

A That I don't know.

Q Where were you stationed on that stakeout?

A I was downstairs.

I think I was in a stairway, but I'm not really sure where I was at that time.

Q And on that occasion did you conduct any investigation with respect to the inside of the bank? Did you go inside the bank at all?

A No, sir, no.

Q But other Officers that you were with did; is that correct?

A I would say yes. I'm not really sure. It's not clear in my mind.

Q And arrests were effected, but you didn't effect any arrests?

A No, sir.

In fact, as soon as the arrests were made, we were sent back to the west side to our precinct.

Q Do you remember who the other Officers involved were?

A No, sir, I don't. That's a long time ago.

Oh, I think one was Allen Durnbach. He was my partner and we were together.

Q How about then Sergeant Guyney, now Lieutenant Guyney.

Was he involved at all, to your knowledge?

A I don't remember, sir.

MR. FORTUIN: Would you mark this page only as Grand Jury Exhibit 8?

(So marked.)

Q I want to show you one page of that FBI report marked Grand Jury Exhibit 8, and I would ask you to read that to see if that refreshes your recollection as to this bank robbery in which you conducted surveillance.

A "A review of the records --"

Q No, read it to yourself.

A Oh, I'm sorry.

(Perusing) Okay.

Q Now, does that refresh your recollection about this bank robbery?

A Not really.

Q Does it appear to be the same robbery that's referred to there?

A I would say so, yes.

Q Do you remember any of these other debts being involved that are listed in Exhibit 8?

A No, sir, I do not know.

Q And you don't recall the names of the persons that were arrested?

A No, I had nothing to do with that. I was with my partner, a fellow named Durnbach and that's all.

I don't recall the rest of the people that were there.

Q During the course of the investigation, did you obtain any information about the way that the bank operated?

A No, sir.

Q In other words --

A Right after the arrests were made, we were sent back to the 20th squad because we worked day duties then and somebody had to cover our office.

I wasn't there I would say more than fifteen minutes, twenty minutes.

Q Do you know a person by the name of John Harvey?

A No sir. If I had seen a picture, maybe, but by that name I would say no.

Q He lived in the Hudson Guild Projects. Does that ring a bell with you?

A No, sir. I wouldn't know where that's located.

Q You are certain that you never met with Mr. Gurney somewhere on the west side?

A Positively.

Q On the street?

A I just didn't like the man. I wouldn't never ever meet with him.

Q I just want to ask you a moment about assets other than houses.

A I haven't got nothing.

Q Do you have any assets?

A No, sir.

Q No stocks, no bonds?

A No, sir, nothing.

Q How about a car?

A I have a car, yes.

Q What kind of a car?

A A 1975 Oldsmobile.

Q Other than that, do you have any assets worth more than a thousand dollars?

A No. My wife has a station wagon that her mother bought for her.

Q You don't have any cash other than the amount of your most recent paycheck?

A No.

Q You don't have any land?

A No. The home that my family lives in, and we have a summer cottage up in Lake Apagon which we bought about four years ago, myself, my brother John and Billy, and it's run down, and we paid about $2,000 apiece for it.

Q And you own no property other than the property you told us about?

A None other than you can see.

Q Let me ask you a few more questions.

Are you married?

A Well -- can I go out --

Q You'd rather not answer that question?

A Well, I'm separated, actually, but I'm trying for a reconciliation with my wife.

MR. FORTUIN: I have no further questions at this time.

Will you temporarily excuse the witness and ask him to wait outside?

FOREMAN: You may be temporarily excused.

THE WITNESS: Okay, thank you very much.

(Witness temporarily excused)

(Time noted 4:17 o'clock p.m.)

EJC-1 September 13, 1976

[from C.R. Re: John Doe
L. Bederman] Dennis Mulligan

Mr. Fortuin

Reg. Jury

[Witness Dennis Mulligan returns]

MR. FORTUIN: Would you direct the witness --

FOREMAN: I'd like to remind you you're still under oath.

WITNESS: Thank you.

Q Now, Detective Mulligan, a couple of the Grand Jurors had questions. One was - after you did the stake-out of the bank on 70th Street, did you leave with your partner?

A Yes sir.

Q And did you have any discussions thereafter with the other officers who had been involved in that investigation?

A I would say no.

Q But you don't have a specific recollection?

A Well, I wouldn't have reason to talk to the fellows that's names are on that piece of paper you showed me were on the 19th Squad. I worked on the 20th Squad, and we never saw these others unless on a stake-out; so I would say definitely no.

Q Let me put this question to you - do you have any complaints about the way you've been dealt with in connection with this investigation, either by the FBI, the United States Attorney's Office or the police officers? A No, except it's a bombshell. Completely in shock. But I'd like to add one thing - my mother has a bank account at 80 -- 79th Street and Second Avenue, and she's seventy-five, and she put it in trust for me. It's in trust for me, but it's her earnings, you know. She worked all her life; whatever she has there is hers.

Q If you needed a bank for any purpose, where would you go customarily? A I have a friend who's a vice president at First National City at Broadway and 72nd. He's a dear friend. If I had anything, I'd go to see him.

MR. FORTUIN: I have no further questions of the witness.

WITNESS: I want to thank you. Thanks a lot.

FOREMAN: You may be excused.

[WITNESS EXCUSED]

jhbr 80

THE COURT: You may step down.

(Witness excused.)

MR. FORTUIN: May I confer with Mr. Slotnick one moment?

THE COURT: Certainly.

(Pause.)

MR. FORTUIN: Your Honor, at this time the government would offer Exhibits 40 and 40-A for identification. I have a stipulation with Mr. Slotnick that these are transcripts of the testimony of Mr. Mulligan before the grand jury in this building on the dates set forth in the exhibits and if the court reporter were called to testify she or he would testify that these exhibits accurately reflect the testimony and events that transpired.

MR. SLOTNICK: No objection whatsoever, your Honor.

THE COURT: Received.

xx (Government's Exhibits 40 and 40-A were received in evidence.)

THE COURT: You understand, ladies and gentlemen, the effect of that stipulation is that if the court reporter, like this gentleman, were to get on the stand he would say that he took the minutes for that particular grand jury, that is what was said.

MR.SLOTNICK: That is on the condition that they will be read to the jury.

MR. FORTUIN: I think we should read them right now.

THE COURT: I would think so. Are they long?

MR. FORTUIN: One is two pages,one is 22 pages.

THE COURT: The 22 page one -- I will see counsel at side bar.

(At the side bar.)

MR. SLOTNICK: Probably the best way of doing it is to let the defendant read his portion, let Mr. Fortuin read his portion.

MR. FORTUIN: No way.

THE COURT: Have you got a stooge you can put up there, somebody who hasn't testified?

MR. FORTUIN: I have an Assistant United States Attorney, yes.

THE COURT: He has not testified?

MR.FORTUIN: No.

THE COURT: Put him up as Mr. Mulligan.

MR. SLOTNICK: We have the real Mr. Mulligan.

THE COURT: I know. I would disapprove of that. I want somebody that is not involved in the case.

(In open court.)

MR. FORTUIN: Your Honor, this is Assistant United States Attorney Joel Rosenthal, who will read the Mulligan portion.

THE COURT: Mr. Rosenthal, his virtue in this situation is he has nothing to do with this case whatever. I just want to avoid question, answer, question, answer, and we will put Mr. Rosenthal up here to pretend that he is Mr. Mulligan.

MR. FORTUIN: I am reading from the transcript of September 3, 1976.

MR.SLOTNICK: May I just object to something at the side bar in regard to this?

THE COURT: Come up.

(At the side bar.)

THE COURT:Have you got an extra copy, so I can see what is going on?

MR. FORTUIN: I don't, I am sorry to say.

MR. SLOTNICK: The two pages on that day are Mr. Fortuin's indication of what the investigation is about and the fact that he has a right to get an attorney and he will give him an adjournment.

MR. GOLDBERGER: How is that relevant on the perjury?

THE COURT: It's relevant on whether he knows what is going on, whether it's a mistake or not.

MR. GOLDBERGER: Wasn't it done on the second day as well, though?

MR. SLOTNICK: I would hope so.

MR. GOLDBERGER: If it was done on the second day, then it would be repetitive and it wouldn't be necessary.

MR. FORTUIN: It's on the issue of intent and willfulness, whether he knew what was coming up.

THE COURT: All right. I will allow it. Overruled.

(In open court.)

THE COURT: In the beginning of this transcript there are going to be certain things that Mr. Fortuin told Mr. Mulligan. I didn't read it with such care as to know whether it is material or not, but they are not being offered for the truth of what Mr. Fortuin says, they are being offered to show what Mr. Mulligan's understanding of the proceeding was at the time he answered the questions. As I say, I haven't read them carefully enough to know whether that caution was of any consequence or not.

(Mr. Fortuin read from Government Exhibit 40-A in evidence.)

MR. FORTUIN: I am now reading from the transcript of September 13, 1976.

(Mr. Fortuin read from Government's Exhibit 40 in evidence.)

MR. FORTUIN: Your Honor, certain exhibits were marked in the grand jury and I would like to offer some of those at this time.

MR. GOLDBERGER: May we have a side bar, Judge?

THE COURT: Yes.

(At the side bar.)

MR. FORTUIN: I wanted to offer the four pictures that were shown to the witness in the grand jury. I have marked those the same as their exhibit identification in the grand jury. That would be 1, 2, 4 and 5.

MR.SLOTNICK: That's Joe Gernie, Judge. 1 is Shannon, 4 is Smith, and 5 is a very clean picture of Mr. Cerasani.

MR. SLOTNICK: I have no objection.

MR. GOLDBERGER: I don't have any objections to Cerasani's picture in that form. I was only concerned that he might show them another mugshot.

THE COURT: Okay.

MR. GOLDBERGER: Judge, could we take five minutes at a convenient time for Mr. Fortuin?

MR. FORTUIN: When this is done, when this is because it was taken out of context, that they might have a reasonable doubt to acquit.

THE COURT: I don't think so.

MR.GOLDBERGER: I join in Mr. Slotnick's motions.

THE COURT: Naturally. Anything further?

MR. GOLDBERGER: I have nothing.

THE COURT: Any comments?

MR. FORTUIN: Nothing, your Honor.

THE COURT: I will be in the next room.

(Recess.)

(At 1 p.m. a note was received from the jury.)

xx (Court's Exhibit 8 was marked.)

(In open court.)

THE COURT: You gentlemen have read the note, I assume, Court's Exhibit 8. What are your respective positions?

MR. GOLDBERGER: Speaking for my client, Judge, the note indicates that they have been 7 to 5 for the last 24 hours, which to me indicates about since they began deliberations. Combining the 7 to 5 with the fact that we had that original note from the original juror that we felt was a substantial problem -- the Court had denied a mistrial -- I would suggest to the Court that a mistrial be declared, a hung jury be declared in the case.

THE COURT: What is your position?

MR. SLOTNICK: I am constrained to join, your Honor. My application --

THE COURT: What is Mr. Fortuin's position?

MR. FORTUIN: Your Honor, I make two requests. The first is that you ask the jury if they have arrived at a decision as to any defendant on any count. It may be that they are merely undecided as to one of the defendants or as to some of the counts.

Secondly, since the note requests help from the Court, and it does not say "We do not feel under any circumstances we cannot reach a verdict," but merely says "Can you help," I would think you should give them the traditional Allen charge.

Whether or not that will have any impact, I don't know.

THE COURT: I think both your requests are reasonable. I have no great hope that it will resolve anything. But then, I have been suprised before.

All right, bring in the jury.

(Jury present.)

THE COURT: Ladies and gentlemen, I have your note, "The number on each side 7 to 5, has not changed in the last 24 hours. Can you help?"

Of course, a note like that always raises competing considerations. In the first place, and I suppose paramount, is that no juror should ever give up a conscientious held belief for any purpose whatsoever. However, on the other hand, it's perfectly obvious to you that the parties don't want to have to go through another trial if they can avoid it.

I would just like to explore several possibilities. In the first place, we have two lawsuits here, we have eight lawsuits, actually. Each count against each defendant is a different lawsuit. Would there be any possibility of an agreement as to any defendant as to any count?

THE FOREMAN: I am afraid not, your Honor, not from what I see.

THE COURT: I suppose when you say 7 to 5 you mean to say it's been the same 7 and the same 5.

THE FOREMAN: I believe it was 8 to 4 on the first ballot.

JUROR NO. 2: No, later.

THE COURT: Don't slip and tell me --

THE FOREMAN: That was the way I remembered it. One did change in the first hour, hour and a half.

But repeated ballots and discussions afterwards seemed to show a pretty solid core, without much give, repeated affirmations, nothing can change their mind.

THE COURT: Why don't you retire again and I will send for you in a minute.

THE FOREMAN: All right, sir. I am sorry to bring bad news, but I thought it was the time.

(The jury left the courtroom.)

THE COURT: Mr. Fortuin, that foreman is an articulate and intelligent fellow.

MR. FORTUIN: May I confer one moment, your Honor?

THE COURT: Certainly.

(Pause.)

MR. SLOTNICK: Your Honor, at this time the defendants move for a mistrial.

THE COURT: I know.

MR. GOLDBERGER: I understand the government will not oppose the application at this point, from our discussion with Mr. Fortuin.

MR FORTUIN: So long as the record is clear, both defendants are making that application, I think it would be senseless to proceed.

THE COURT: Let's discuss, before we get

the jury back, what we are going to do next.

I can take the case immediately after this case I am trying and bump everything else.

MR. SLOTNICK: Is your Honor's decision incumbent upon what happens hereafter? I don't think that would be fair. Your Honor has to make a decision on the motion.

THE COURT: I am going to grant the motion.

MR. GOLDBERGER: Judge, I have a case, United States against Rico, which starts a week from Monday in front of Judge Lasker. I have 3,000 pages, four previous records of the witnesses, to go through.

THE COURT: If we start with this case you won't try that case.

MR. GOLDBERGER: That case has a deadline date. Judge Lasker set it down. We have a six-month problem. There have been some waivers.

THE COURT: What about the 18th of April?

MR. SLOTNICK: I have a long standing commitment, your Honor, with regard to that. I had promised Judge Walsh up in Schenectady County that nothing would interfere with my starting a trial there.

MR. GOLDBERGER: Judge, is it possible that Mr. Fortuin and Mr. Slotnick and I can sit down, work out something perhaps on Monday, get back to your chambers, of course, subject to your Honor's approval, work out some kind of a date or some kind of a situation that would be acceptable to the Court?

MR. SLOTNICK: If not, put it back into the wheel?

THE COURT: All right. Bring the jury in.

MR. SLOTNICK: Before the jury comes in, there is no question that each of you individually, Mr. Cerasani and Mr. Mulligan, join in this motion for a mistrial.

DEFENDANT CERASANI: Yes, your Honor.

THE COURT: You understand that means you can be tried again before another jury.

DEFENDANT CERASANI: Yes, your Honor.

THE COURT: And you understand that too?

DEFENDANT MULLIGAN: Yes.

(Jury present.)

THE COURT: Ladies and gentlemen, I am as disappointed as I guess you all are that you were unable to resolve this case at this time, but counsel for both side agree, in the light of what your foreman said, that it would really be purposeless to discuss the matter further.

All I can say if there can't be an agreement, it's important that there be a disagreement. It's important that every juror decide the case according to his or her conscience. If unanimity is impossible, then there is no unanimity. That's why we have the rule about unanimity.

You are excused with the thanks of the Court.

(Jury excused.)

THE COURT: I just want to make one thing clear. The rules of our district make it prima facie that the same Judge tries the case again, but I want to make it perfectly clear if either defendant has any feeling that the case should be tried before a different Judge, it will be. That's wholly within my discretion.

No counsel needs to be concerned if they make such an application I will hold it against them at some other time, on some other occasion, and the defendants need not be concerned because there is no likelihood that either of them will be before me again in any other case. You don't have to decide that now, but let me know right away.

Assume that it's not, is there any point, Mr. Fortuin, in discussing with Judge Lasker whether --

MR. GOLDBERGER: I really don't think there is because the Judge set the case down. It's about two days before the deadline and the case has to be tried or dismissed on the government's part.

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